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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

19 Cr. 285 (GBD)

5 LAURENCE F. DOUD III,

6 Defendant.

Trial

7 -----x

8 New York, N.Y.
9 January 25, 2022
10:30 a.m.

10 Before:

11 HON. GEORGE B. DANIELS,

12 District Judge
13 -and a Jury-

14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorney for the
17 Southern District of New York

BY: NICOLAS T. ROOS

18 ALEXANDRA ROTHMAN

THOMAS S. BURNETT

Assistant United States Attorneys

19 ROBERT C. GOTTLIEB

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Attorneys for Defendant

21 Also Present: Sunny Drescher

22 Jacqueline Hauck

Paralegal Specialists

23 Special Agent George Burdzy, DEA

Investigator Kathleen Whitmore, DEA

M1PBDOU1

(Case called)

(Trial resumed; jury not present)

THE COURT: Our jurors are here. We can continue. As you've been notified as of yesterday our Covid protocols have changed, and anyone who is going to unmask has to have a test that day. That's basically the protocol. How soon do we need to get to the exhibits the expert witness issued?

MS. ROTHMAN: There were two letters filed last night. Our objection to certain exhibits I think is going to come up during Mr. Pietruszewski's testimony, unless the defense says they're not using those exhibits. I think the expert issue will come up after Mr. Pietruszewski is off the witness stand.

THE COURT: Do we need to address this before we call our next witness?

MS. ROTHMAN: We're talking in terms of as to the order, whether we'll put Mr. Paulsen on after Mr. Pietruszewski or Mr. Cutler. Mr. Paulsen is very short, so I think the Cutler issue is rapidly approaching.

THE COURT: We'll have to address this after this witness. With regard to the government's objections, do you intend to use these exhibits with this witness?

MR. GOTTLIEB: Your honor, interesting enough after court yesterday what I did -- what my office did, we went through all of the exhibits we intended to spend time on. And what I was going to propose and what I do propose this morning,

M1PBDOU1

1 assuming your Honor's decision on the continuing objection
2 about the emails that are contained in their letter from last
3 night, assuming your Honor's ruling continues, I've actually
4 separated a great number of the emails. And subject to, I
5 assume, the continuing objections that are stated by the
6 government, just having them placed in evidence without
7 questioning the witness about it, just put it in evidence. The
8 other handful of emails that I would question him certainly do
9 include the emails that the government highlighted in their
10 letter. They're the same type of emails that your Honor has
11 permitted in evidence throughout this trial. There's no
12 evidentiary basis to keep them out.

13 THE COURT: I'm just trying to figure out what we need
14 to resolve before we move forward with this witness. What
15 exhibits are going to come up with this witness that we need to
16 resolve before we bring the jury in?

17 MR. GOTTLIEB: Just focusing on the exhibit that they
18 have objected to. It will be Exhibit A18, A22, A35, A37, A38,
19 A40 and A71.

20 THE COURT: So every one of them?

21 MR. GOTTLIEB: That's correct.

22 THE COURT: That was my question. We have to resolve
23 all of these issues before you can conclude your cross
24 examination?

25 MR. GOTTLIEB: Yes, your Honor.

M1PBDOU1

1 THE COURT: All right.

2 MR. GOTTLIEB: I would point out, because obviously we
3 received this late last night. We have taken a look at it, but
4 your Honor, it's the same objection. This issue has been
5 raised time and time again during this trial. And to make it
6 clear, your Honor, these emails and the response, putting aside
7 the issue of completeness, it is state of mind. It is not
8 hearsay.

9 Specifically, your Honor, your Honor knows full well
10 the government's entire thrust of their case has been that
11 Mr. Doud did not want compliance. Mr. Doud did not want
12 anything done, did not want any checking, and time and time
13 again, the evidence that is coming in, the evidence that is
14 being objected to once again goes to what Mr. Doud is being
15 told. What he is being told affects his state of mind
16 obviously and affects and can be considered as to why he did or
17 did not do something else.

18 So, your Honor, for the same reasons that we have
19 argued before, it is relevant. It is not hearsay. It explains
20 his state of mind. It goes to the issue, your Honor, of his
21 intent; why he did or why he did not do certain things.
22 There's no difference between the continuing objection that's
23 contained in their letter focusing on these issues than any of
24 the other emails that your Honor has previously permitted in
25 evidence.

M1PBDOU1

1 THE COURT: The jury is outside, so I don't want to
2 keep them too long. I guess, Ms. Rothman, you have to tell
3 me -- let's just quickly go through them. A18, what's the
4 hearsay you're objecting to? What hearsay statement?

5 MS. ROTHMAN: "I look forward to getting as compliant
6 with the suggestions as we can." That is a statement being
7 offered for the truth, why Mr. Doud wants to get compliant with
8 the suggestions.

9 The second issue on that email is, it's not even about
10 compliance in the sense of what this case is about. It's about
11 recordkeeping. It's about recording the ways they purchased
12 controlled substances. So what the defense is trying to do is
13 get a little soundbite of the defendant saying, I want us to be
14 compliant, when that's not really what's going on here. If the
15 defendant wants to convey that, he needs to take the witness
16 stand and tell that to the jury.

17 THE COURT: What is the statement you object to in
18 A22?

19 MS. ROTHMAN: "I agree too." Mr. Cullen says, "If the
20 reason we are taking on additional business is profit, that is
21 usually the wrong reason to proceed." And Mr. Doud says, "I
22 agree."

23 If the defense is willing to redact Mr. Doud's
24 statements, we have no problem with that underlying email
25 coming in. They can then argue that Mr. Doud was told all

M1PBDOU1

1 these things and he relied upon that. But again, introducing
2 the defendant's own statements in these emails is
3 inappropriate.

4 THE COURT: What about A35?

5 MS. ROTHMAN: The defendant's statement: "We do not
6 want any real risk."

7 THE COURT: What about 37?

8 MS. ROTHMAN: The defendant's statement, "We have
9 spent a lot of money to keep Linden Care compliant or to try
10 to. The laws must be obeyed." These are self-serving
11 statements by the defendant he's offering for the truth of the
12 matter asserted.

13 THE COURT: What about A38?

14 MS. ROTHMAN: This is a statement from an individual
15 at Linden Care saying, "The Linden Care team is striving to
16 achieve the highest level of compliance and will work closely
17 with your team in this regard."

18 THE COURT: Say that again.

19 MS. ROTHMAN: Sure. This is the statement from Inder
20 Tallur from Linden Care. "The Linden Care team is striving to
21 achieve the highest level of compliance."

22 THE COURT: That's the statement by Linden Care?

23 MS. ROTHMAN: Correct. It's hearsay.

24 THE COURT: And what about A40?

25 MS. ROTHMAN: There's a lot of A40 that's problematic.

M1PBDOU1

1 I'll quote and it's quoted in our letter. That the DEA
2 completed an audit of Linden Care. The audit went well. Art
3 did a great job. We are very pleased with Linden Care and the
4 audit could not have gone better.

5 THE COURT: Whose statement is that?

6 MS. ROTHMAN: These are statements from Inder Tallur
7 from Linden Care summarizing the purported findings of DEA's
8 audit. If the Court will remember, we put in a letter
9 objecting to this admission of that DEA report on the Linden
10 Care audit. The defense said they weren't going to go down
11 this path. This is another way of getting in those same
12 hearsay statements.

13 THE COURT: What about A71?

14 MS. ROTHMAN: There's two issues in A71. The first is
15 a statement from Joe Brennan that two ex-DEA agents said that
16 RDC could move forward with opening accounts if the paperwork
17 was in Ms. Pompeo's hand, but before the dispensing data was
18 analyzed.

19 And the second equally problematic statement is that
20 Ms. Pompeo agrees with the change. On that point, they had
21 Ms. Pompeo on the witness stand for days. If they wanted to
22 ask her about her views on the change, they should have asked
23 her when they cross examined her. To introduce the statement
24 that Jessica agrees with the change is hearsay, being offered
25 for the truth of the asserted, and it should be excluded or at

M1PBDOU1

1 a minimum redacted.

2 THE COURT: Any of these emails in which the defendant
3 Mr. Doud is not copied on these emails?

4 MS. ROTHMAN: Mr. Doud is copied on every email, and
5 most of the statements are his own statements. The only
6 exception would be in 38, 40 and 71 where it's statements of
7 someone from Linden Care or from Joe Brennan.

8 What I would say this, your Honor, is two things. If
9 they want to argue state of mind, they don't need Mr. Doud's
10 statement to do it. They can rely upon the underlying email
11 that puts facts in front of him, but his response should not be
12 admitted before the jury unless he wants to testify.

13 The second thing is, if your Honor is inclined to
14 allow these in -- and again we would oppose -- there should be
15 a limiting instruction, that anything in here is not coming in
16 for the truth of the matter asserted, meaning the defense
17 cannot argue that Linden Care had a great audit by the DEA.
18 The defense cannot argue that these facts are true, which I
19 think they're going to do in summation.

20 Mr. Janey opened on, I'm going to read to you a Linden
21 Care report about great findings. It's improper. It's
22 hearsay. It should be excluded.

23 THE COURT: It seems to me that at this point, one, I
24 don't totally agree with the government as to all of these
25 statements are hearsay. They put in statements that reflect

M1PBDOU1

1 what they consider to be statements that are consistent with
2 the defendant's involvement in a conspiracy. Defendant has the
3 right to put in statements in that regard that are not
4 consistent with that. However, the defendant does not have the
5 right to put in statements that make factual representations
6 about the past, about whether or not certain events occurred.

7 I believe that there are a number of these exhibits
8 that do that. I believe that A37, A38, A40 and A71 are those
9 type of statements. I find that those statements are not
10 admissible with regard to what has occurred with regard to
11 investigations or prior actions or prior statements of
12 witnesses. I agree with the defense that unless otherwise
13 pointed out to me that A18, A22, A35 are not offered for the
14 truth of any particular facts that are being alleged by a
15 witness.

16 It does reflect -- its purpose is to demonstrate
17 whether or not the defendant's actions at that time were
18 consistent or inconsistent with his knowledge and intent to be
19 involved in a conspiracy. To the extent that is consistent
20 with that it is admissible and not hearsay, to the extent it's
21 submitted for the opposite purpose to demonstrate that at the
22 time the defendant made statements that the defense can
23 legitimately argue are inconsistent with someone who had
24 knowledge and intent to join a conspiracy and is not a
25 representation about some previous fact that's being offered

M1PBDOU1

1 for the truth of those facts.

2 MS. ROTHMAN: Thank you, your Honor.

3 MR. GOTTLIEB: Your Honor, may I.

4 THE COURT: One at a time. Mr. Gotlieb.

5 MR. GOTTLIEB: Your Honor, I would just like to
6 address the issue statements by, let's say Linden Care. That
7 is exactly what is state of mind. And what I mean by that --

8 THE COURT: No, that's not his state of mind.

9 MR. GOTTLIEB: This is what I mean, if you introduce a
10 statement to prove that the statement was made to Mr. Doud,
11 somebody's statement stated to Mr. Doud about Linden Care doing
12 its best to clean up its act, whatever. The fact that the
13 statement was made to Larry Doud goes directly to his state of
14 mind and would be what's in his mind when he then says, As a
15 result of information I received, even if it's wrong, even if
16 it's not true, any statements made by people about Linden Care
17 being in compliance, that's not being introduced for the truth
18 of what's asserted. It's simply being introduced to show that
19 Larry Doud heard it and therefore may or may not explain why in
20 this case he may have released pharmaceuticals.

21 THE COURT: I don't agree, because I don't think that
22 that is particularly probative of whether or not Mr. Doud was
23 involved in a conspiracy with others as charged in this
24 indictment by the fact that Linden Care said that they got a
25 clean bill of health in an email to Mr. Doud. I don't agree

M1PBDOU1

1 with that. I think that other statements in which Mr. Doud --
2 as a matter of fact, I think that Mr. Doud's statement
3 themselves is a greater reflection of his state of mind rather
4 than someone else's statement about what occurred.

5 For someone else to say -- at Linden Care to say that
6 they got a clean bill of health is not what is at issue here.
7 What is at issue here is whether or not Mr. Doud agreed with
8 others that he was going to distribute drugs without -- even
9 though there were red flags and it was inappropriate to do so.

10 I don't think that -- I think that the statements by
11 someone else at Linden Care don't reflect an innocent or guilty
12 state of mind, and I think that -- and don't reflect and is not
13 probative of whether or not Mr. Doud joined the conspiracy with
14 others not at Linden Care, as the government has charged.

15 As I said, I've limited the nature of my ruling as to
16 do with, again, whether or not their factual statements that'
17 are being offered for the truth of those statements about
18 events that occurred in the past, to the extent that it falls
19 into that category.

20 I agree with the government that it's simply
21 self-serving hearsay. And to the extent that the defendant
22 wants to talk about his state of mind, about what he knew and
23 what he believed and what he intended, those things are
24 reflected in comments that he has made consistent with the
25 government's offer of emails, and comments that they say he's

M1PBDOU1

1 made that reflect otherwise but are not reflected by someone
2 else coming to him and just making a statement.

3 It doesn't make it any less likely or more likely that
4 he was involved in this conspiracy because someone from Linden
5 Care said they got a clean bill of health, unless you accept
6 the fact that they did get a clean bill of health, and I don't
7 think we can accept that fact. To the extent that those are
8 the nature of the statements, as I said, my position has been
9 very clear. And Mr. Doud being put on emails, communicating
10 himself and those people who communicated who are alleged to
11 be -- that the government alleges are co-conspirators, those
12 statements are appropriate and completeness for non-hearsay
13 reasons. I agree with you that they can reflect Mr. Doud's
14 state of mind. I think it's inappropriate to attempt to
15 reflect Mr. Doud's state of mind by statements of a third
16 person about events that happened in the past, and to offer
17 those statements on the basis that one must assume that those
18 facts are true in order to give the defendant benefit of the
19 inference that you want to give him on that.

20 MR. GOTTLIEB: Your Honor, may I just quickly respond?

21 THE COURT: Yes.

22 MR. GOTTLIEB: Within some of those emails, there may
23 be lines that would not fall in the category of statements that
24 your Honor is now precluding. Again, we only got this late
25 last night. But also, this other issue which I had raised is

M1PBDOU1

1 that we had separate and a part from the exhibits that the
2 government has now pointed out they object to, I have a number
3 of emails which I was going to ask -- again consistent with the
4 Court's ruling -- that the government stipulate to their
5 admissibility and I wouldn't even question the witness about
6 them. They have not been objected to.

7 I know the government clearly has gone through all of
8 the defense exhibits that we previously provided them, so the
9 ones that have not been subject to a similar objection, I would
10 propose having them marked and received, and I don't even
11 intend to question the witness.

12 THE COURT: Well, if the parties agree they're
13 admissible into evidence, I will accept that stipulation, but I
14 don't have such an agreement before me at the moment.

15 MR. GOTTLIEB: May I make a suggestion which I think
16 it would save an enormous amount of time. I think this is the
17 way we should proceed. If we could take a short break now, go
18 through all the ones that we would propose are not covered by
19 your Honor's ruling and just have them admitted. I would just
20 put in the record which exhibits now are in evidence before the
21 jury.

22 THE COURT: Well, are you going to use those exhibits
23 before this witness?

24 MR. GOTTLIEB: If I know they're being admitted, no, I
25 will not use it. If the government is going to raise

M1PBDOU1

1 objections again, then I'll go through each one as we've done
2 previously and as the government has done.

3 THE COURT: I hope we would be beyond that at this
4 point. If you want a few minutes to do that, I have the jury
5 standing outside cooling their heels.

6 MR. GOTTLIEB: Judge, I'm ready to go. We did our
7 best to see if we can pare it down.

8 MS. ROTHMAN: Your Honor, I don't know what their
9 emails are. If they're not going to ask the witness questions
10 about them, it seems like they should come in on the defense's
11 case. I'm happy to look at them now and give my objections.
12 They could have been sent to us last night or a week ago.

13 THE COURT: Look, you want me to send the jury back to
14 the jury room?

15 MR. GOTTLIEB: Your Honor, the government's not
16 interested. I'm ready to go. I will proceed the way we were
17 proceeding. I was trying to shorten it. I don't need the
18 government to say when we should have sent them something when
19 the objections today could have been raised and are the same
20 objections that were not successful up until now.

21 MS. ROTHMAN: It might help things if the defense
22 tells us the exhibit number. I can look at them. Rather than
23 objecting on the fly, I could review them in advance and that
24 could save time.

25 MR. GOTTLIEB: Exactly what I was proposing.

M1PBDOU1

1 THE COURT: Look, I'm not here to force you to agree
2 to anything. If you can work it out, you can work it out or
3 you can fight it out. You got two choices. I don't want to
4 waste the jury's time.

5 If there's something you want to offer and give it to
6 them now and have them start looking at it and tell which ones
7 they object and which ones they don't, then go ahead and do
8 that, but I'm worried about the jury's time.

9 MR. GOTTLIEB: Your Honor, I will do whatever the
10 Court wants.

11 THE COURT: I don't want anything. I want whatever
12 makes you happy.

13 MR. GOTTLIEB: I'm not sure that's the case.

14 THE COURT: Procedurally.

15 MR. GOTTLIEB: Your Honor, can I suggest if we can
16 send the jury back. I will give them -- I have them
17 segregated. I will show it to the government.

18 THE COURT: Tell the jury that we want to put them
19 back into the jury room for another ten minutes so we can
20 resolve some issues and then we'll bring them back in.

21 (Recess)

22 MS. ROTHMAN: I can let your Honor know to what the
23 government objects. There aren't too many, but there are some
24 that we object to, I think, consistent with your Honor's ruling
25 on what is appropriate and what is not appropriate to come in.

M1PBDOU1

1 THE COURT: Why don't you give me copies of those and
2 I can start looking.

3 MS. ROTHMAN: Of the exhibits? I have some of them,
4 your Honor. I can give them to you.

5 THE COURT: I want to get started.

6 MR. GOTTLIEB: Your Honor, most of it's been resolved.
7 We're ready to proceed and I'll put them on the board. And if
8 they have an objection, they can have an objection.

9 THE COURT: Why don't you show me the exhibits if you
10 have copies so I can read them while we proceed.

11 Let's bring the witness back in.

12 MR. GOTTLIEB: Your Honor, we can give you the defense
13 binder that has all of the exhibits, and the government now I
14 assume will be saying which ones they are continuing to object
15 to.

16 MS. ROTHMAN: I'm putting together a list right now.

17 THE COURT: Let's put the witness back in the box.
18 I'm going to start looking at those and we'll bring in the jury
19 so we can continue.

M1PBDOU1

Pietruszewski - Cross

1 (In open court; jury present)

2 THE COURT: Good morning. Thank you for your
3 patience. I think we're still on schedule to finish the
4 witnesses by the middle of next week. We're trying to make
5 sure that we proceed efficiently, particularly with exhibits.

6 Thank you for your patience, but we're ready to
7 proceed. Continue with the cross examination at this time, Mr.
8 Gottlieb.

9 MR. GOTTLIEB: Thank you very much, your Honor.

10 CROSS-EXAMINATION (CONTINUED)

11 BY MR. GOTTLIEB:

12 Q. Good morning, Mr. Pietruszewski.

13 A. Good morning.

14 Q. Where we were yesterday with regard to compliance, you told
15 us there was a compliance program; you were the head beginning
16 and 2006, correct?

17 A. Yes.

18 Q. And you were busy doing compliance among other duties even
19 before 2017, correct?

20 A. Yes.

21 Q. And you told the jury that one of the problems, there
22 wasn't enough personnel to do everything that you thought
23 should be done, correct?

24 A. Yes.

25 Q. And included in what you were able to do was to recommend

M1PBDOU1

Pietruszewski - Cross

1 that certain pharmacies be either suspended or terminated,
2 correct?

3 A. I presented the facts to Larry and Joe. It was their
4 decision to decide whether they should be, what they wanted to
5 do.

6 Q. Is it your testimony that every decision to suspend a
7 pharmacy from purchasing controlled substance had to be sent to
8 Larry Doud?

9 A. To go through Joe and Larry Doud.

10 (Continued on next page)

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Pietruszewski - Cross

1 Q. My question is, did every decision to suspend a pharmacy,
2 while you were the head of compliance, did it first require the
3 approval of either Joe Brennan or Larry Doud?

4 A. It was supposed to, yes.

5 Q. I didn't ask you if it was supposed to. Did you suspend,
6 not send out controlled substances on your own, without ever
7 speaking with Larry Doud beforehand?

8 A. Maybe one store.

9 Q. What store was that?

10 A. It might have been Casey Prescription Pad.

11 Q. And other than Casey, you never put a hold on controlled
12 substances or suspended a pharmacy without first speaking to
13 Larry Doud?

14 A. That and maybe AJ. I don't totally, I don't remember
15 exactly.

16 Q. What's AJ?

17 A. I think it was one of the four stores that we did report.

18 Q. Did you report it on your own?

19 A. I don't totally remember. I thought I sent an e-mail about
20 it.

21 Q. Would you agree that prior to the DEA visit to RDC in
22 November of 2016, can we agree that RDC conducted approximately
23 over 200 field compliance visits to prospective or established
24 customers?

25 A. I'm not -- I don't know if it was 200.

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Pietruszewski - Cross

1 Q. Can you give us your estimate of the number of pharmacies
2 that were the subject of an internal RDC internal visit,
3 inspection?

4 A. There was maybe 100.

5 Q. And that would be between 2012 to 2017?

6 A. 2016, I thought you said.

7 Q. Okay. 2016.

8 A. Yes.

9 Q. Is it fair to say that Jessica Pompeo conducted most of the
10 analysis and review of customers while she was working for RDC?

11 A. Her and others.

12 Q. Did she train other individuals to conduct field
13 inspections?

14 A. Not field inspections. Analyze the data.

15 MR. GOTTLIEB: Can we put on the screen, please,
16 Government Exhibit 278. I don't believe, your Honor, it's
17 everywhere. I don't think it's on the screen in the back for
18 the jurors.

19 THE COURT: They should have it now.

20 MR. GOTTLIEB: I think it's happening. Okay.

21 Q. Now, this is a Government Exhibit, 278, and I believe you
22 were asked questions already about this. Do you recognize it?

23 A. I don't recognize this particular one, no.

24 Q. Have you seen this exhibit before?

25 A. Not -- I don't think I saw this particular exhibit, no.

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Pietruszewski - Cross

1 MR. GOTTLIEB: This is a government exhibit in
2 evidence; is it not, Ms. Rothman?

3 MS. ROTHMAN: I think the witness's testimony is he's
4 never seen it before. It is in evidence.

5 MR. GOTTLIEB: This is a government exhibit. Thank
6 you.

7 MS. ROTHMAN: Yes.

8 Q. Now this particular exhibit includes a list of companies
9 that were suspended or terminated, correct?

10 MS. ROTHMAN: Objection. The witness doesn't know.

11 THE COURT: Overruled. He can examine and determine
12 whether that's correct, if he knows.

13 Q. If you look at the right-hand corner, looking at where it
14 says "action" and then to the right of that it says "date."
15 This is a list of pharmacies that were either suspended or
16 terminated during the period of time, 2017 being the beginning,
17 going down to 2018.

18 Can we just scroll it down so the jury can see.

19 It goes down to 2019 and 2020, correct?

20 A. Yeah, I haven't seen this, no.

21 Q. If we can go back to the top, please. Now, looking at this
22 exhibit that's before you, on the bottom, on the left-hand
23 side, can we highlight that. That can't be highlighted. Take
24 a look, it says 4.25.13-10.20. 4.25.13-2.10.20 suspended and
25 terminated.

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Pietruszewski - Cross

1 Do you see that?

2 A. I see that.

3 Q. April 25, 2013, to February 10, 2020. That's what this
4 chart is supposed to be?

5 MS. ROTHMAN: Objection. The witness doesn't know
6 anything about this chart.

7 THE COURT: Overruled. He can answer.

8 A. Again, I don't remember seeing this chart, this time frame.

9 Q. This is a government exhibit that has on it 4/25/2013 to
10 February 10, 2020. If we can just go to the bottom and see
11 what the dates are. The last date here is 2/10/2020 concerning
12 Newtown Pharmacy being suspended. Do you see that?

13 A. Yes.

14 Q. Now, do you know who prepared this chart and put on it
15 April 25, 2013, to February 10, 2020?

16 A. No.

17 Q. Were you shown a similar chart? Not this particular one,
18 were you shown a similar chart?

19 A. I don't remember, no.

20 MR. GOTTLIEB: I'd like to show you, and just your
21 Honor, the witness and counsel, Defense Exhibit 82.

22 Q. Now, this document appears to be a similar type of document
23 as the government introduced, correct?

24 MS. ROTHMAN: Objection. I think we need a sidebar,
25 your Honor.

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Pietruszewski - Cross

1 THE COURT: Come up.

2 (At the sidebar)

3 THE COURT: Yes, Ms. Rothman?

4 MS. ROTHMAN: What's going on here is -- let me back
5 up. The witness has never seen the government exhibit that is
6 in evidence. He's testified to that and Mr. Gottlieb wants to
7 ask questions which he has done. The witness has never seen it
8 before.

9 What Mr. Gottlieb is trying to do is put in a
10 different version of a termination spreadsheet, that the
11 witness has also never seen, and thus he is the wrong person to
12 try to get this in through.

13 What I think the defense is going to start doing is
14 trying to read information on this chart, ask him if it looks
15 similar, and attempt to offer this chart in evidence. That's
16 improper and should not happen.

17 If the defense wants to ask Mr. Pietruszewski
18 questions about pharmacies that were terminated earlier, they
19 can do that. What they can't do is try to get in a document
20 the witness has never seen before through cross-examination.
21 And my concern is that's what's happening here.

22 I don't want to make this argument in front of the
23 jury. I'd like to move on and get this cross-examination done.
24 But again, even though Mr. Gottlieb didn't like the answer from
25 Mr. Pietruszewski, he's never seen these charts before. He is

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Pietruszewski - Cross

1 the wrong witness.

2 THE COURT: Mr. Gottlieb, what --

3 MR. GOTTLIEB: I don't disagree. We are not seeking
4 to introduce the chart.

5 THE COURT: Stop. Let me ask you a very simple
6 question. What is the admissible evidence that you want from
7 this witness about this chart he has never seen?

8 MR. GOTTLIEB: That there are two different charts to
9 begin with. I'm not seeking to introduce this chart. But more
10 specifically, I intend to ask this witness about suspensions
11 and terminations before 2017.

12 THE COURT: What does that have to do with this chart?

13 MR. GOTTLIEB: Interestingly enough, the first chart
14 we received from the government had the suspensions and
15 terminations beginning in 2013, going to February 10, 2020.
16 The one that they placed in evidence kept out all of the
17 suspensions and terminations before 2017, because the
18 government is trying to argue that the only time they suspended
19 or terminated is once Larry Doud left the company. This
20 witness is in a position, because he's already testified --

21 THE COURT: To say what?

22 MR. GOTTLIEB: To testify about in 2013, '14 or '15
23 which pharmacies were either suspended or terminated.

24 THE COURT: That's not the question. The question
25 really is what testimony do you expect this witness to give

Mlp3dou2

Pietruszewski - Cross

1 with regard to this exhibit?

2 MR. GOTTLIEB: I would only use this exhibit to
3 refresh recollection if that became necessary.

4 THE COURT: Well, that's not what you've done.

5 MR. GOTTLIEB: Your Honor, I was laying a foundation.
6 Once now he says he didn't see it --

7 MS. ROTHMAN: No, no.

8 THE COURT: Slow down. Mr. Gottlieb, the witness says
9 he's never seen this document before. He's got no testimony to
10 give about the accuracy of the document. The document
11 additionally is not in evidence.

12 MR. GOTTLIEB: One document is in evidence.

13 THE COURT: This document is not in evidence.

14 MR. GOTTLIEB: Government Exhibit 278 is in evidence.
15 The one that is similar but includes 2013, 2017, is not yet in
16 evidence.

17 THE COURT: The one you are questioning him about is
18 not in evidence.

19 MR. GOTTLIEB: Correct.

20 THE COURT: You cannot read off the document and you
21 cannot ask him what's on the document, because he has no
22 knowledge of the document.

23 MR. GOTTLIEB: I agree.

24 THE COURT: So, why are we still on this document?

25 MR. GOTTLIEB: Your Honor, I didn't know what his

Mlp3dou2

Pietruszewski - Cross

1 answer was going to be, whether or not he saw this document. I
2 heard it for the first time as you did.

3 THE COURT: Well, it seems to me everybody else knew
4 it but you. It was clear to me.

5 MR. GOTTLIEB: Well, that's -- your Honor, that --

6 THE COURT: He never saw the document. He already
7 said he never saw the document.

8 MR. GOTTLIEB: I had no idea. I didn't know he didn't
9 see the one the government put in evidence.

10 THE COURT: I want to go forward. Is there any
11 admissible question that you intend to ask him about this
12 document?

13 MR. GOTTLIEB: I am --

14 THE COURT: Yes or no?

15 MR. GOTTLIEB: Your Honor, I am going to be asking him
16 now, I'm going to put the document down, and I'm going to ask
17 the witness --

18 THE COURT: I didn't ask you that. I asked you is
19 there any admissible question and answer that you intend to ask
20 him about this document?

21 MR. GOTTLIEB: Not about the document.

22 THE COURT: Then put the document aside, and let's
23 move forward. What else are you going to ask him? Why are we
24 on this document?

25 MR. GOTTLIEB: Your Honor, I am done asking about the

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Pietruszewski - Cross

1 document. I didn't know what he was going to say. Now I
2 intend to now put the document aside, and to say tell me in
3 2013, was that suspended. If he needs something to refresh
4 recollection, then I'll do what I can do under the rules of
5 evidence.

6 THE COURT: What do you intend to do with this
7 document?

8 MR. GOTTLIEB: If he says I don't know, I would say is
9 there anything that might refresh your recollection. And show
10 him a --

11 THE COURT: No.

12 MR. GOTTLIEB: Your Honor, we already --

13 THE COURT: What you're permitted to do is you're
14 permitted to put the document in front of him, ask him to look
15 at the document, without identifying the document, and ask him
16 does that refresh his recollection. Period. That's all you
17 are entitled to do. You are not entitled to describe the
18 document to him. You're not entitled to put in evidence things
19 from the document that the document does not in evidence
20 reflect.

21 MR. GOTTLIEB: We are in full agreement, your Honor.
22 I understand how to refresh recollection.

23 THE COURT: That's not what you were doing here and
24 this witness did not say he doesn't remember anything. So you
25 weren't asking the proper question, if you were attempting to

Mlp3dou2

Pietruszewski - Cross

1 refresh his recollection. If you think he doesn't remember
2 something, then you ask him, you show him something that you
3 think is going to refresh his recollection. It's real clear
4 that this document is not going to refresh his recollection.

5 MR. GOTTLIEB: It's not so clear at all, your Honor.
6 It is not clear when he looks at the document and says, oh,
7 yes, Amato Pharmacy was suspended in 2013, if it refreshes his
8 recollection. It is not so clear it wouldn't refresh
9 recollection.

10 THE COURT: What is your next question?

11 MR. GOTTLIEB: I'm going to ask him Amato Pharmacy in
12 2013, was that suspended by the company. I don't recall. Let
13 me show you this document, does that refresh your recollection
14 as to whether or not Amato Pharmacy was suspended in 2013.
15 That would be the way I would do it.

16 THE COURT: If that's what you were going to do, I
17 wish you had already gotten there. You haven't gotten there.
18 All right?

19 MR. GOTTLIEB: Okay.

20 THE COURT: Get there. Let's move on this. This
21 document is not in evidence, you can't put it in the back door
22 if you can't get it in the front door. If there is some other
23 witness that's admissible, do it.

24 MR. GOTTLIEB: Just because the government prescribes
25 some sort of motive like that to me doesn't mean it's true.

Mlp3dou2

Pietruszewski - Cross

1 THE COURT: It doesn't have anything to do with
2 motive. It means you are a very experienced and fine lawyer.
3 You know what the rules are. The rules are not you can slip a
4 document in front of a witness who has no idea what this
5 document is and start quoting from the document.

6 MR. GOTTLIEB: I understand that.

7 THE COURT: That's what you were doing. That's what
8 you did. You want the transcript read back to you? That's
9 what you did.

10 MR. GOTTLIEB: No. I want to move forward.

11 THE COURT: Let's move forward. Let's not waste any
12 more time.

13 MS. ROTHMAN: Thank you, your Honor.

14 (Continued on next page)
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Pietruszewski - Cross

1 (In open court)

2 MR. GOTTLIEB: May I proceed, your Honor?

3 THE COURT: Yes.

4 MR. GOTTLIEB: Thank you.

5 BY MR. GOTTLIEB:

6 Q. Mr. Pietruszewski, going now to 2013. Is it not true that
7 Amato Pharmacy was suspended by RDC from purchasing controlled
8 substances?

9 A. I'm not sure if it was Amato Pharmacy.

10 Q. Is there anything that might refresh your recollection that
11 Amato Pharmacy was suspended in April of 2013?

12 A. I don't remember if it was Amato Pharmacy.

13 Q. Will you please take a look at A82. Just take a look at
14 it, don't read it, and this is only for the witness, your
15 Honor, and counsel.

16 Looking at A82, and just direct your attention to the
17 top. Does it refresh your recollection that Amato Pharmacy was
18 suspended in April of 2013?

19 A. I don't remember if it was Amato.

20 Q. Total Care Pharmacy. Can you tell us whether or not that
21 was suspended in 2013 by RDC from purchasing controlled
22 substances?

23 A. They weren't suspended from purchasing controlled
24 substances.

25 Q. And do you remember when that was or what year

Mlp3dou2

Pietruszewski - Cross

1 approximately?

2 A. They weren't suspended from purchasing controlled
3 substances.

4 Q. So, your testimony is at no time was Total Care Pharmacy
5 ever suspended?

6 A. Only, it was oxycodone.

7 Q. So, you do recall that Total Care Pharmacy was suspended
8 from purchasing oxycodone in April of 2013?

9 A. They refused to sign the agreement that the attorneys drew
10 up.

11 Q. And as a result of that, they were suspended by RDC,
12 correct?

13 A. Until they signed the agreement, and then they were being
14 sold to again.

15 Q. Were they suspended when they refused to sign the
16 agreement; yes or no, sir?

17 A. I don't remember if it was immediate, no.

18 Q. When was it that you can best recall that Total Care
19 Pharmacy was suspended by RDC?

20 A. I don't remember the date, sir.

21 Q. Can you give us the approximate year?

22 A. It probably was in 2013, but they ended up signing our
23 agreement, and then they were turned back on.

24 Q. And that was not unusual, was it, specifically, it's true
25 that if a problem arose, there were times, beginning in 2013,

Mlp3dou2

Pietruszewski - Cross

1 that RDC would halt the purchases, and then if they seem to be
2 in compliance, resume the purchases, correct?

3 A. There were times, yes.

4 Q. What about Specialty Care Pharmacy; you were asked
5 questions about these pharmacies on direct examination when the
6 government questioned you.

7 A. This was the same owner as that other pharmacy. It was in
8 the same agreement, sir.

9 Q. So in 2013, Specialty Care Pharmacy was also suspended; yes
10 or no?

11 A. Two of the pharmacies I believe were suspended. I don't
12 know if all four were suspended, because they started buying
13 more from the other locations and I reported that.

14 Q. What about Medical Center Pharmacy in 2013, were they
15 suspended?

16 A. I don't remember Medical Center. I don't remember the
17 name.

18 Q. If we can look at A28, just the witness, does that refresh
19 your recollection -- A82. Defense Exhibit 82, does that
20 refresh your recollection?

21 A. I don't know, I don't remember --

22 Q. I have to complete -- so the record is clear. I'm sorry.

23 A. That's fine.

24 Q. Does that refresh your recollection that in April of 2013,
25 Medical Center Pharmacy was suspended?

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Pietruszewski - Cross

1 A. I don't remember Medical Center Pharmacy.

2 Q. What about Main Avenue Pharmacy, July of 2013. Is it not
3 true that Main Avenue Pharmacy was terminated by RDC from
4 purchasing controlled substances; yes or no, sir?

5 A. They weren't terminated in 2013.

6 Q. They weren't?

7 A. No.

8 Q. Okay. You're sure of that?

9 A. They were reinstated I believe.

10 Q. Were they first terminated before they were reinstated,
11 sir?

12 A. Terminated as a customer you're saying?

13 Q. Terminated from purchasing controlled substances. That's
14 what I mean.

15 A. I think they may have been turned off for a while and then
16 they were turned back on after. It was not that long because
17 we were told by the B&E that the pharmacy did what they were
18 supposed to do. And we turned them back on.

19 Q. Based on information you received from B&E. What is B&E
20 for the jury?

21 A. The board -- I'll be honest of you. The board of pharmacy
22 in Albany I believe it is.

23 Q. So what you told the jury, so it can be clear, is they were
24 terminated but then reinstated when you received information
25 that they were now in compliance, correct?

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Pietruszewski - Cross

1 A. They said the pharmacist did their due diligence.

2 Q. And with that information, RDC then reinstated their
3 rights, their power to purchase controlled substances, correct?

4 A. Yes.

5 Q. And Plainfield Pharmacy -- I asked that?

6 K R D Pharmacy. Is it not true in August of 2013, K R
7 D Pharmacy was terminated from ordering controlled substances?

8 A. They may have. I don't remember specifically if that's
9 when it was.

10 Q. Looking at Defense 82. Would that refresh your
11 recollection, just take a look at it, a little ways down. K R
12 D Pharmacy. Does that refresh your recollection that that
13 company was terminated by RDC from purchasing controlled
14 substances in August of 2013?

15 A. I mean, I'm not 100 percent sure.

16 Q. AJ Family Pharmacy. Is it not true that in November of
17 2013, AJ Family Pharmacy was suspended from purchasing
18 controlled substances; yes or no?

19 A. I'm not sure.

20 Q. Would looking at Defense Exhibit 82 refresh your
21 recollection as to whether or not AJ Family Pharmacy was
22 suspended?

23 A. I'd have to check my e-mails. I -- I'm not sure what the
24 chart came from. So I'm not 100 percent sure.

25 Q. I'm simply asking you, based on your recollection, you're

Mlp3dou2

Pietruszewski - Cross

1 testifying in front of the jury about what you recall as you
2 did in direct examination. This doesn't refresh your
3 recollection that AJ Family Pharmacy was suspended in November
4 of 2013?

5 A. They may have.

6 Q. What about Neighbor Pharmacy at Pearl River? Directing
7 your attention to December 9, 2013. Was Neighbor Pharmacy at
8 Pearl River suspended from purchasing controlled substances?

9 A. Well, I don't see it on the screen. But...

10 Q. Before you see anything on the screen, just from your
11 recollection.

12 A. I don't remember us turning them off in 2013.

13 Q. Taking a look at Defense 82. Does that refresh your
14 recollection that Neighbor Pharmacy at Pearl River, Neighbor
15 Prescription Pharmacy at Pearl River was suspended by RDC in
16 December of 2013?

17 A. I don't remember.

18 Q. Wellness Pharmacy, directing your attention to December of
19 2013. Was Wellness Pharmacy suspended from purchasing
20 controlled substances in 2013?

21 A. I'm not sure. I know we did an audit. We sent Carlos
22 Aquino. But I don't remember if we turned them off at that
23 time.

24 Q. What about Casey's Prescription Pad in April of 2014. Was
25 Casey's Prescription Pad suspended from purchasing controlled

Mlp3dou2

Pietruszewski - Cross

1 substances?

2 A. Yes, they were.

3 Q. By the way, was AJ Pharmacy ever terminated by RDC after
4 being suspended?

5 A. I'm not sure, sir.

6 Q. Directing your attention to June of 2014. Do you recall
7 that AJ Family Pharmacy was terminated from its ordering
8 privileges?

9 A. I don't remember.

10 Q. Looking at Defense 82. Does that refresh your recollection
11 that in June of 2014, AJ Family Pharmacy was terminated from
12 ordering controlled substances?

13 A. I don't remember.

14 Q. Greenwich Pharmacy in September of 2014, is it not true
15 they were terminated by RDC from ordering controlled
16 substances?

17 A. I do not remember.

18 Q. Looking at Defense 82 for identification, does that refresh
19 your recollection that Greenwich Pharmacy was terminated from
20 ordering in 2014?

21 A. I don't remember the name of the pharmacy.

22 Q. What about Kingston Pharmacy, Yakob Pharmacy Inc. In
23 September of 2014, September 1, 2014, did RDC terminate its
24 privileges from ordering controlled substances?

25 A. I don't remember, sir.

Mlp3dou2

Pietruszewski - Cross

1 Q. Now, every time you're saying you don't recall, you're not
2 telling the jury that didn't happen. You just don't have a
3 recollection, correct, one way or the other?

4 A. Yeah, I do not remember. I don't have the recollection of
5 that.

6 Q. Stanton & Negley, September of 2014. Isn't it true that
7 they were suspended from ordering controlled substances?

8 A. I think they were only suspended from buying Suboxone.

9 Q. So you recall that even before 2014, RDC suspended Stanton
10 & Negley from purchasing some controlled substances?

11 A. Julius Morton went to Stanton & Negley, I don't remember
12 when it was, and we -- investigated about them purchasing the
13 substance Subutex.

14 Q. That was approved by management, correct?

15 A. It was approved by Larry and Joe, yes.

16 Q. Yeah, so, even before we continue now, every time you have
17 indicated to the jury that RDC either suspended or terminated,
18 is it fair to say that they can conclude that management,
19 whether it's Joe Brennan or Larry Doud, approved of that
20 decision, correct?

21 A. Yes.

22 Q. Austin Chemists, directing your attention to 2014. Was
23 Austin Chemist terminated from purchasing controlled substances
24 by RDC?

25 A. They were, but I don't remember if that was the date, sir.

Mlp3dou2

Pietruszewski - Cross

1 Q. All Care Pharmacy. December 2014. Is it not true, sir,
2 that All Care Pharmacy had its privileges to purchase
3 controlled substances suspended by RDC?

4 A. I don't remember if All Care did or did not.

5 Q. Please take a look at Defense 82. Does that refresh your
6 recollection, and this is going down a little less than halfway
7 down. Does that refresh your recollection that All Care
8 Pharmacy was suspended in December of 2014?

9 A. I don't remember.

10 Q. Coatesville Pharmacy. Is it not true that Coatesville
11 Pharmacy had its ability to order controlled substances from
12 RDC in December of 2014, that those privileges were suspended?

13 A. I don't remember. I remember the pharmacy, but I don't
14 remember.

15 Q. Looking at Defense 82, does that refresh your recollection
16 that Coatesville Pharmacy had its ability to purchase
17 controlled substances suspended in December of 2014?

18 A. I don't remember, sir.

19 Q. Cuidamed Pharmacy?

20 A. Cuidamed? I don't remember, sir.

21 Q. You don't recall that it had its ability --

22 A. I remember -- I'm sorry, sir.

23 Q. No. You don't have to apologize. Just that the court
24 reporter is taking everything down.

25 A. Yes.

Mlp3dou2

Pietruszewski - Cross

1 Q. You don't recall that that pharmacy in January of 2015 now
2 had its ability to purchase controlled substances suspended?

3 A. I do not remember, sir.

4 Q. Still in 2015, Mt. Airy, do you recall that Mt. Airy
5 Pharmacy had its authority to purchase controlled substances
6 terminated by RDC on May 5, 2015?

7 A. No, I do not remember.

8 Q. Do you remember the name Mt. Airy?

9 A. I know Mt. Airy, but I don't remember the pharmacy.

10 Q. Wellness Pharmacy appearing again, High Falls. Is it not
11 true that in May of 2015, it had its authority to purchase
12 controlled substances suspended?

13 A. I just remember Wellness was one time, so if it was the
14 last time, then this time maybe is when they were suspended
15 when you brought it up before. I don't think they were
16 suspended twice and then reinstated, sir.

17 Q. K-E-W-A-N, is not true that Kewan Pharmacy had its license
18 suspended for refusal to permit an onsite inspection by RDC in
19 May of 2015?

20 A. That may be true, but I don't remember, sir.

21 Q. Abigail's Pharmacy. Do you recall in July of 2015, that
22 Abigail had its authority to purchase controlled substances
23 suspended by RDC?

24 A. I don't remember.

25 Q. EZ Care Pharmacy. Do you recall in August 2015, EZ Care

Mlp3dou2

Pietruszewski - Cross

1 had its authority to purchase controlled substances from RDC
2 terminated?

3 A. I don't remember.

4 Q. And now in the last four or five that I've asked you, is it
5 fair to say looking at this document wouldn't refresh your
6 recollection, right?

7 A. That is correct.

8 Q. ATA Pharmacy. September of 2015, did it have its authority
9 to purchase controlled substances terminated by RDC?

10 A. I don't remember.

11 Q. Cedar Care pharmacy, did it have its license, its authority
12 to purchase controlled substances terminated by RDC in
13 September of 2015?

14 A. I don't remember the name of the pharmacy, sir.

15 Q. Organix, is it not true they had their authority to
16 purchase controlled substances suspended by RDC in October of
17 2015?

18 A. I remember the pharmacy name, but I don't remember them
19 being suspended at that time.

20 Q. Do you remember them being suspended at some time?

21 A. Might have been in 2017. I don't remember. I think it was
22 later on.

23 Q. The Chemist Shop, is it not true that they had their
24 authority to purchase controlled substances terminated,
25 terminated in November of 2015?

Mlp3dou2

Pietruszewski - Cross

1 A. I remember they were terminated. I don't remember the
2 date, sir.

3 Q. Was it approximately 2015?

4 A. It may have been, sir.

5 Q. Prime Health, Inc., do you recall that their authority to
6 purchase controlled substances was terminated by RDC in
7 November 2015?

8 A. I do not remember.

9 Q. Poplar Pharmacy, did they have their authority to purchase
10 controlled substances terminated by RDC in November of 2015?

11 A. I do not remember, sir.

12 Q. ProHealth Pharmacy, Inc., is it not true that they had
13 their authority to purchase controlled substances suspended in
14 December of 2015?

15 A. I thought it was later. That was the sister store of
16 Chemist Shop. I thought that was in 2017.

17 Q. You recall at some point?

18 A. I wasn't in compliance, but I remember a report after, I
19 think that was in 2017. But I don't have my e-mails so I don't
20 remember.

21 Q. Toms River Pharmacy, directing your attention now to
22 January 4, 2016. Is it not true that Toms River Pharmacy had
23 its authority to purchase controlled substances suspended by
24 RDC?

25 A. It may have, sir.

Mlp3dou2

Pietruszewski - Cross

1 Q. Kings Way Pharmacy in February of 2016. Is it fair to say
2 that they had their authority to purchase controlled substances
3 suspended by RDC?

4 A. They may have, sir.

5 Q. Vital Drugs in March 17, 2016, did Vital Drugs have their
6 authority to purchase controlled substances suspended -- I'm
7 sorry -- terminated from purchasing any controlled substances?

8 A. I do not remember.

9 Q. And then just, we have four more.

10 Superstar Pharmacy. Fair to say Superstar Pharmacy
11 was terminated by RDC from ordering controlled substances in
12 March of 2016?

13 A. I do not remember, sir.

14 Q. Sheely's. Is it not true they had their authority to
15 purchase controlled substances suspended in May of 2016?

16 A. I remember they -- I believe, I don't know if that was the
17 time frame, but I do remember Sheely's.

18 Q. You remember them being what, suspended or terminated?

19 A. They were suspended from buying.

20 Q. And Lake Carmel Pharmacy, do you recall that they were
21 suspended from purchasing controlled substances in May of 2016?

22 A. I do not remember, sir.

23 Q. And finally, covering this period of time, Allerton Park,
24 do you recall that Allerton was terminated by RDC from ordering
25 controlled substances in August of 2016, do you recall that?

Mlp3dou2

Pietruszewski - Cross

1 A. I do not recall that, sir.

2 MR. GOTTLIEB: May I have one moment, please.

3 THE COURT: Yes.

4 MR. GOTTLIEB: If we can put up on the screen, your
5 Honor, for the witness and counsel, A43, please.

6 Q. Mr. Pietruszewski, do you see this is an e-mail on the top
7 from you to Carlos Aquino, correct?

8 A. It is an e-mail from me to Carlos, yes.

9 Q. And it concerns a Wellness Pharmacy and an audit, correct?

10 A. I see, yes, it has to do with Wellness RX, yes.

11 Q. It's dated January 14, 2014, correct?

12 A. Yes.

13 MR. GOTTLIEB: Your Honor, I ask that this be received
14 in evidence, please.

15 MS. ROTHMAN: Objection for reasons we discussed
16 earlier, your Honor.

17 MR. GOTTLIEB: Your Honor, we don't believe this is
18 covered by what we had discussed before.

19 THE COURT: I have a list here, and it is on that
20 list.

21 MR. GOTTLIEB: That's a list that the government
22 wrote, your Honor.

23 THE COURT: Right. So they do, they say they object.

24 MR. GOTTLIEB: No, they object.

25 THE COURT: Let me take a look at it.

Mlp3dou2

Pietruszewski - Cross

1 MR. GOTTLIEB: Thank you.

2 (Pause)

3 THE COURT: I'm going to need some more information
4 about this exhibit.

5 Do you want to come to the sidebar.

6 MS. ROTHMAN: Sure.

7 THE COURT: Quickly.

8 (Continued on next page)

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Mlp3dou2

Pietruszewski - Cross

1 (At the sidebar)

2 THE COURT: I have a bunch of exhibits, maybe about 10
3 exhibits that the government put on that list and said they
4 objected to. So what is this exhibit and why are you offering
5 it?

6 MR. GOTTLIEB: Your Honor, this goes directly to
7 compliance, it is an e-mail from Bill Pietruszewski, this is
8 843, authorizing the audit on behalf of RDC to conduct an
9 audit. It is directed to Carlos Aquino, the outside
10 consultant. And this is simply the part of the evidence that
11 RDC did have compliance, and was communicating with Mr. Aquino
12 to go out and to conduct an audit on behalf of RDC, at
13 Wellness. This does not include Larry Doud's -- any alleged
14 hearsay. This is consistent with everything your Honor
15 permitted up until now.

16 THE COURT: And you're trying to demonstrate what by
17 this exhibit?

18 MR. GOTTLIEB: That RDC was actively involved in
19 compliance. It may not have been a great compliance program.
20 But RDC was contacting Carlos Aquino, the outside consultant,
21 to go to Wellness, a pharmacy, for the purpose of conducting an
22 audit investigation. And it's January of 2014.

23 THE COURT: Ms. Rothman, what's your objection?

24 MS. ROTHMAN: I think there are two groups. It is
25 prime good acts evidence which is impermissible in a case like

Mlp3dou2

Pietruszewski - Cross

1 this. We have not alleged that Wellness Pharmacy, which is the
2 pharmacy here, is one of our pharmacies that we're speaking
3 about with respect to diversion. There are I'm sure plenty of
4 pharmacies where there was not diversion happening.

5 THE COURT: Why isn't that relevant evidence in this
6 case, that there are pharmacies that they did in fact --

7 MS. ROTHMAN: I think that's improper good act
8 evidence. You typically can't offer proof that on some
9 instance you didn't commit a crime as probative of why you
10 didn't on another one. The second issue I have is the letter
11 that's attached on page -- I don't know -- six of the exhibit
12 which are statements from Ed Ullmann the owner of the pharmacy
13 about what's happening at his pharmacy. This is hearsay. So
14 if the defense --

15 THE COURT: What's hearsay.

16 MS. ROTHMAN: His statements about what's going on in
17 his pharmacy, what he's agreed to.

18 THE COURT: What does he say?

19 MS. ROTHMAN: He says no new patients will be filled
20 by these doctors. He says that we will, we are going to
21 provide reports. He makes lots of statements that are being
22 offered for the truth.

23 THE COURT: Those aren't offered for the truth. Those
24 facts haven't happened yet. That's the future. That's not the
25 past.

Mlp3dou2

Pietruszewski - Cross

1 MS. ROTHMAN: We did review Dr. Terdiman on New York
2 Profile and there were no reported deficiencies or reported out
3 of state actions. Those are statements offered for the truth,
4 that there were no issues with respect to a particular doctor.

5 THE COURT: This is the way I am going to go and this
6 is going to be my guidance with regard to these issues. And
7 part of it is we have to have a further in-depth discussion
8 about the experts and the charge. This seems to be exactly
9 within the realm of what you want your expert to testify about,
10 what percentages of instances were investigated, not
11 investigated. I'm not sure why your percentages are admissible
12 but an instance he wants to point out where it was in fact
13 investigated is not admissible.

14 MS. ROTHMAN: I don't think the example of Bill
15 Pietruszewski asking Carlos to go to a pharmacy has anything to
16 do with what our expert will talk about with respect to orders
17 of interest and the observations that he saw. I think there
18 are two separate issues, your Honor.

19 THE COURT: I assume this is part of the percentage of
20 instances where he did in fact, they did in fact investigate
21 and they did in fact suspend.

22 MS. ROTHMAN: I don't think our expert will speak
23 anything about Wellness Pharmacy.

24 THE COURT: That's not my question.

25 MR. JANEY: Those numbers are captured in those

Mlp3dou2

Pietruszewski - Cross

1 charts, is what I understand your Honor to be describing, and I
2 believe that's correct.

3 THE COURT: And you think that, I'm trying to
4 understand your position generally. Your position generally is
5 that they shouldn't be allowed to offer evidence of instances
6 where they did in fact investigate?

7 MS. ROTHMAN: That's our view. I think you rejected
8 that view, your Honor. My concern is --

9 THE COURT: That's what I'm trying to understand.

10 MS. ROTHMAN: There are statements both in the letter
11 from Mr. Ullmann and in Mr. Pietruszewski's e-mail to Carlos
12 are being offered for the truth, and I am not sure what the
13 basis for admission is, your Honor.

14 THE COURT: I don't understand what you claim is being
15 offered for the truth. None of those things have occurred yet.
16 So it is not true, we don't know if they did this or they
17 didn't do this in the future.

18 MS. ROTHMAN: As of today, Mr. Ullmann still mentions
19 to a letter to me regarding Dr. Terdiman how the doctor has no
20 suit against him.

21 That's a statement being offered for the truth.

22 THE COURT: Okay. I'm just not sure, I don't
23 understand what you're fighting about. I just don't understand
24 what it is, why you don't want the jury to hear this.

25 MS. ROTHMAN: Well, I think it's improper, your Honor,

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Pietruszewski - Cross

1 for the jury to hear about an instance when Carlos Aquino went
2 to a pharmacy in 2013.

3 MR. JANEY: This is an objection we've heard time and
4 time again, your Honor has ruled on.

5 THE COURT: We have to have a broader discussion. Are
6 you going to ask further questions of this witness of this
7 document now?

8 MR. GOTTLIEB: I was just going to have it received in
9 evidence and just have a portion read, your Honor.

10 THE COURT: What portion?

11 MR. GOTTLIEB: Your Honor, I have a number that --
12 they haven't agreed to everything, so I have a number of --

13 THE COURT: That's why I asked the question. What's
14 the answer to my question? You said you wanted to read a
15 portion. I asked you what portion you wanted to read.

16 MR. GOTTLIEB: Actually, I only intend on reading a
17 portion of the e-mail, not this letter that they are talking
18 about.

19 THE COURT: What portion do you want to read?

20 MR. GOTTLIEB: The first two paragraphs. First two
21 paragraphs.

22 THE COURT: Which says what?

23 MR. GOTTLIEB: As we spoke earlier on the phone, I am
24 requesting that you conduct a DEA audit on behalf of RDC at
25 wellness. Pharmacist in charge is, and then back on

Mlp3dou2

Pietruszewski - Cross

1 December 20 and read that paragraph. It's very short.

2 THE COURT: All right. I'm going to admit the
3 document.

4 (Continued on next page)

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Pietruszewski - Cross

1 (In open court).

2 THE COURT: I'll admit the document in evidence.

3 (Defendant's Exhibit A43 received in evidence)

4 MR. GOTTLIEB: May we publish that to the jury,
5 please?

6 THE COURT: Yes.

7 Q. Mr. Pietruszewski, this is a January 14, 2014 e-mail from
8 you to Carlos Aquino, cc'd Joe Brennan and Larry Doud, and its
9 subject request DEA audit statement of work.

10 And you wrote: Carlos, hello. As we spoke earlier on
11 the phone, I am requesting that you may conduct a DEA audit on
12 behalf of RDC at Wellness Prescription LLC, with the address.
13 The owner of the store is Ed Ullmann, the store number is with
14 a phone number. The pharmacist in charge is Nelson Cuevas whom
15 actually is the only pharmacist on the payroll. This store has
16 been filling narcotics for seven weeks.

17 Back on December 20, I spoke to Mr. Ullmann in length
18 that Dr. Terdiman, Santos, and the fraudulent scripts of
19 Madaline Rosado NP that they cannot fill for any of those
20 prescribers. Since then I spoke to Mr. Ullmann on this past
21 Friday the 10th again explaining to him why they cannot fill
22 scripts by Dr. Terdiman due to his field of medicine is not
23 pain management. He seems to understand after an hour and a
24 half conversation, but as of today Mr. Ullmann still mentions
25 to a letter to me regarding Dr. Terdiman I enclose for you to

Mlp3dou2

Pietruszewski - Cross

1 read how the doctor has no suit against him. Clearly
2 Mr. Ullmann does not understand that a doctor needs to be in
3 the correct field of medicine to prescribe oxycodone products.

4 Ending there, Mr. Pietruszewski, you would agree that
5 this reflects the request of Mr. Aquino to conduct an audit for
6 the reasons that you laid out in this e-mail, correct?

7 A. Yes, that's correct.

8 Q. If we can have Defense Exhibit 39 shown to the witness.

9 Do you see that up there, sir?

10 A. Yes, I see it.

11 Q. This is an e-mail on the bottom part from Larry Doud to
12 Donald Bilgore. Again, Donald Bilgore is the attorney for RDC?

13 A. Yes, for 40 years I believe or so.

14 Q. This is April 12, 2014?

15 A. Yes.

16 Q. And this concerns Linden Care, correct?

17 A. Yes.

18 Q. Now, Mr. Pietruszewski, is it not true that there were
19 times that Mr. Doud expressed concerns about Linden Care's
20 practices?

21 A. Maybe.

22 Q. In fact, do you recall that Carlos Aquino conducted audits
23 of Linden Care and prepared reports, correct?

24 A. He did do an audit, yes.

25 Q. And you are aware that Larry Doud read Mr. Aquino's

Mlp3dou2

Pietruszewski - Cross

1 reports, correct?

2 A. Yes.

3 Q. Is it fair to say that there were times that Larry Doud
4 indicated that he could not believe what he was learning about
5 Linden Care, and that he had a level of concern based on what
6 he was reading. Do you recall that?

7 A. He may have.

8 Q. And these e-mails deal directly with what you've now been
9 testifying about concerning a report of Mr. Aquino, Larry
10 Doud's reaction, and then your comments, correct?

11 A. Yes.

12 MR. GOTTLIEB: I ask that A39 be received in evidence.

13 THE COURT: Any objection?

14 MS. ROTHMAN: No objection.

15 THE COURT: It will be admitted in evidence.

16 (Defendant's Exhibit A39 received in evidence)

17 MR. GOTTLIEB: May we publish it, please?

18 THE COURT: Yes.

19 MR. GOTTLIEB: Thank you.

20 Q. I think it is on the screen, if we can go to page two.
21 This is, on the top of -- bottom of page one. It is from Larry
22 Doud, April 12, 2014, to Donald Bilgore, and it reads in part
23 at the beginning:

24 I read Carlos's report this morning. I can't believe
25 that his report wasn't that of someone looking to cut their

Mlp3dou2

Pietruszewski - Cross

1 wrists. He sure didn't seem to express the level of concern
2 that I felt in reading the report. It is my opinion that we
3 should share this report with BelHealth, the parent company,
4 and give them a week or so to come up with the process they are
5 going to use to correct things and then go meet with them at
6 our earliest opportunity. They need to put this all in order,
7 for them and for us. We need a program that they will adhere
8 to and report to us on a regular basis, quarterly or more
9 frequently if that is what we need. Monday, if you agree, I
10 will contact Harold Blue or Inder Tallur about this and see
11 what we can get going. They should have a copy of this report
12 as poorly written as it is. I'll be in Monday and I know you
13 said you would call. You know if we were off like this it
14 would be all over. Thank goodness for Bill's aggressive care
15 of our DEA business. But no matter how well we do at RDC, it
16 is our responsibility to oversee what our customer is doing and
17 Linden Care's sloppy procedures could severely impact us.

18 Correct? That's what it reads?

19 A. Yes, it does.

20 Q. Going up to page one without reading it. It has in the
21 middle on April 12 your response, correct?

22 A. Yes.

23 Q. And your response was: Lind Care is supplying RDC with
24 quarterly dispensing reports.

25 So just stop you right there. There were times you at

Mlp3dou2

Pietruszewski - Cross

1 RDC were obtaining dispensing reports from customers, correct?

2 A. In 2014, yes.

3 Q. You continue: But this is the first time we had Carlos
4 conduct inventory counts of the drugs of concern. We as a
5 company do not conduct inventory counts normally at our stores,
6 but with an account like Linden Care you can see we must. I am
7 glad you feel the same way as I do about this report, for this
8 is huge. What concerns me, and I told Don this, is that Carlos
9 does not seem overly concerned. I just think of CVS in
10 California missing 70,000 units of hydrocodone and they will
11 subject to huge fines, so I feel Carlos needs to explain to RDC
12 in details why he is not overly concern.

13 Correct?

14 A. Yes.

15 Q. And right above that, finally, just Larry Doud's response.
16 His responses to those last comments is "I understand."

17 Correct?

18 A. Yes.

19 MR. GOTTLIEB: If we can go next to A68. And just for
20 witness and counsel, your Honor.

21 Q. A68 is a thread of e-mails from you to Larry Doud, correct,
22 and Joe Brennan is included in one, correct?

23 A. I'm looking at the top. Oh. I'm sorry. I was looking at
24 the top of the e-mail.

25 MS. ROTHMAN: We have no objection to this.

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Pietruszewski - Cross

1 THE COURT: It will be admitted in evidence.

2 (Defendant's Exhibit A68 received in evidence)

3 A. I see in the middle.

4 MR. GOTTLIEB: Your Honor, can we just show it to the
5 jury?

6 THE COURT: Yes.

7 MR. GOTTLIEB: Thank you.

8 Q. If we can go to the second page, please. I'm sorry, bottom
9 of the first page. I'm sorry.

10 We have your e-mail to Larry Doud, Joe Brennan and Don
11 Bilgore August 7, 2013. And you say: I have some upsetting
12 news. Carlos went to visit Plainfield Pharmacy account 3900
13 due to high percentage of controls and DEA visit. Carlos said
14 first 20 minutes was going smooth and Bobby manager of store
15 was cooperating. Carlos asked to see the pharmacy most recent
16 narcotic prescription that were filled, and Bobby brought out a
17 few piles to view. Just about all of them were prescriptions
18 from Florida, Florida doctor fills the script out, patient
19 mails to Plainfield, customer sends cash, and Plainfield mails
20 to customers address in Florida. The customer never steps foot
21 into the store. Pete called me at about 4 p.m. to tell me this
22 and he said there is only 28 prescriptions like this last
23 month. I asked Pete who else he buys from and what they kicked
24 out McKesson or ABC about six or eight months. He said they
25 use RDC and Top RX but RDC gets majority of business. Carlos

Mlp3dou2

Pietruszewski - Cross

1 called me after Pete and said that the 28 scripts Pete was
2 referring to was only one pile. he did not look at the other
3 three piles. Also Carlos said that they buy oxycodone from Top
4 Prescriptions RX, QK Health and the bulk from RDC. He also
5 uses Harvard for normal RX, so RDC is not primary business.
6 With talking to Carlos, I turned off their controls and so you
7 are aware we stopped filling the narcotics since our visit from
8 DEA last week.

9 If we can end it there, sir. You informed Mr. Doud
10 that, in talking to Carlos, you then turned off Plainfield's
11 controls, correct?

12 A. Yes.

13 (Continued on next page)

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M1PBDOU3 Pietruszewski

1 Q. We can go to Defense 62, please. This is just for the
2 witness, your Honor and counsel.

3 Now, this email again is from you, Lanny Doud, a
4 thread concerning Waschko's, and this is in June of 2014,
5 correct?

6 A. Yes.

7 Q. And it concerns investigating and then making a decision to
8 turn off controls being able to purchase controlled substances,
9 correct?

10 MS. ROTHMAN: We have no objection.

11 THE COURT: You're offering this into evidence.

12 MR. GOTTLIEB: Yes, please.

13 THE COURT: It will be admitted into evidence.

14 (Defendant's Exhibit A62 received in evidence)

15 MR. GOTTLIEB: Having it published to the jury, your
16 Honor.

17 Q. Just briefly, on the bottom it's your email to Paul Kearns,
18 Larry Doud, Lanny Doud, Joe Brennan. The subject is Waschko's,
19 correct?

20 A. Yes.

21 Q. June of 2014?

22 A. Yes.

23 Q. You write: I just spoke to Falcon Express about Waschko's
24 pharmacy. It seems that the DEA were at the store. They
25 allowed the driver to make the delivery and they inventory the

M1PBDOU3

Pietruszewski

1 product. When the driver was leaving, he saw the DEA putting
2 the computer and files in clear bags. I let Paul know of it.
3 I am not sure do we want to place them on do not sell. And
4 continuing to the top.

5 Lanny Doud responds: This is interesting. Paul
6 claims we are were primary and all their business was \$6,000,
7 of which 15 percent was controls and CIIs, nothing that would
8 have put up a red flag. I wonder if they were buying somewhere
9 else and made us believe that was all they had. I would just
10 shut them off controls and CIIs.

11 And your response, then, was: Okay. I will turn off
12 the controls until I hear different, correct?

13 A. Yes.

14 Q. So you made the final decision to shut off the controls
15 after Lanny Doud spoke to you, correct?

16 A. Lanny said we should turn them off, so I turned them off.

17 Q. May we have shown to the witness, your Honor, A23A for
18 identification. Just show it to the witness.

19 Now, you testified on direct about the SOP, the
20 standard operating procedures, correct, concerning compliance?

21 A. Yes.

22 Q. And this particular document, it's fair to say, is
23 statements you made in June of 2016 regarding the potential
24 change in the SOP concerning the control -- sale of controlled
25 substances, correct?

M1PBDOU3

Pietruszewski

1 A. I'm not sure. I mean, I have to read it.

2 Q. Again, if you could just look down your email, if we could
3 highlight that for the witness.

4 Does that indicate that this thread is about the SOP
5 and the changes?

6 A. It's just stating that RDC --

7 Q. It's not in evidence, yet. Does it pertain to the standard
8 operating procedures and potential change?

9 A. I'm not sure.

10 Q. Does that refresh your recollection, looking at it?

11 A. I remember the email. I see it.

12 Q. In fact, you recall that you asked and suggested that any
13 new SOP, standard operating procedure, should provide that RDC
14 will conduct a review prior to opening a pharmacy up to
15 controls, correct?

16 A. Yes.

17 MR. GOTTLIEB: Your Honor, I ask this email be
18 received in evidence.

19 THE COURT: Any objection?

20 MS. ROTHMAN: No objection.

21 THE COURT: It will be admitted into evidence.

22 (Defendant's Exhibit A23A received in evidence)

23 MR. GOTTLIEB: Your Honor, that's now in evidence.
24 I'm not even going to put it up on the board. It's in
25 evidence.

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Pietruszewski

1 Looking at Defense Exhibit A53. Perhaps before I ask,
2 I don't know if the government has any objection to the receipt
3 of this email?

4 MS. ROTHMAN: One moment. No objection. No
5 objection.

6 THE COURT: Offering it into evidence?

7 MR. GOTTLIEB: Yes.

8 THE COURT: It will be admitted.

9 (Defendant's Exhibit A53 received in evidence)

10 MR. GOTTLIEB: If we could publish it to the jury.

11 Q. Now, this email thread, if we could look at page 3 going
12 down at the bottom, bottom of page three beginning with Joe
13 Brennan. If we could highlight that, please.

14 This is an email from Joe Brennan, November 12, 2015
15 to Larry Doud and others here and it reads: Larry, Juice
16 called to go over his second audit at the Chemist Shop. He has
17 real concerns. Juice explained the DEA is currently
18 investigating a doctor that the Chemist Shop has a relationship
19 with. Joe and Roberto said the doctor Joseph Olivieri writes
20 30 percent of their business controls CII to CV. The doctor's
21 service is upstairs from the pharmacy.

22 Juice said confidentially that he has spoken to the
23 DEA unit doing the investigation and strongly recommends that
24 we stop doing control business with the Chemist Shop. I don't
25 see a choice on this one. Joe and Roberto refuse to stop doing

M1PBDOU3

Pietruszewski

1 business with Joe Olivieri and four other doctors that are
2 questionable. Juice knows at least two are being investigated.
3 A majority of pharmacies follow the advice Juice provides. Joe
4 and Roberto will not.

5 And then continuing to the part of the thread right
6 above that from Richie Cullen. Richie Cullen again to Joe
7 Brennan, Larry Doud and to you included. It reads: Joe,
8 unfortunately RDC has gone as far as it can with Roberto and
9 Joe if they choose not to listen to Juice's advice. We have no
10 alternative but to cease selling them controls and narcotics.

11 Pro Compliance it appears is of the same opinion. It
12 appears the Chemist Shop is already made a decision to split
13 their business between RDC and Cardinal, preparing for the time
14 when they will switch all their business over to Cardinal
15 Kinray based on RDC's decision to stop selling them controls.

16 We know based on the climate in the industry, RDC is
17 better served erroring on the side of caution, and I agree with
18 your proposal.

19 And then if you continue up above on November 12, 2015
20 Julius Morton responds, if we could highlight the email on
21 November 12, 2015 at 3:15 p.m.

22 Your Honor, I can expedite this if I could just --
23 I'll be right back. That was entirely my fault. It was page 1.
24 All right.

25 Page 1 on November 12, 2015 Julius Morton wrote: All

M1PBDOU3

Pietruszewski

1 my thoughts. I will do whatever RDC management would like me to
2 do. I can call and try to have another sitdown with them. No
3 guarantee they want to see me again, but all they can say is
4 no.

5 The question I have is, What would you like me to say
6 or do that I have not already said or done. I have already
7 told them my opinions and concerns, and they have in turn told
8 me they disagree with my opinion particularly on Dr.Olivieri.
9 They feel as license practitioners, they are acting
10 appropriately and beyond reproach filling for this doctor who
11 is not board certified in pain management.

12 I think they are making such statements more as
13 businessmen than as practicing pharmacists. But again, that is
14 just my opinion. We had Pro Compliance PVS review their data.
15 And although Pro Compliance reviewed the same report period,
16 our analysis was confirmed and corroborated. This account has
17 many concerns. The cash is only one of the issues we have
18 discussed with them. Unfortunately, they did not say to Richie
19 we have decided to stop filling for Dr. Olivieri.

20 Going to the next paragraph without reading the rest
21 of that particular paragraph it reads: But I will again go
22 into them and present my case. I will, however, not disclose
23 my confidential information, as I respectfully ask all in
24 contact with the customer to do as well.

25 These gentleman are supposed to act responsibly as

M1PBDOU3

Pietruszewski

1 professionally licensed practitioners. If they cannot
2 understand our concerns based upon the soundness of the
3 clinical argument, then it should be abundantly clear that we
4 are risking our reputation standing and possibly more by
5 continuing to do with business with them.

6 Why does the threat of DEA scrutiny and attention have
7 to be the impetus for the responsible and ethical change? I
8 would only suggest that another meeting take place after we
9 have received a reviewed their current dispensing. Having that
10 data will begin tell us whether they are all about the talk and
11 not action.

12 If the report shows that there is no change in their
13 dispensing, then I guess management will need to consider how
14 much more time and opportunity RDC is willing to extend to this
15 customer before the decision is made to take some appropriate
16 action. I remain hopeful for best resolution possible.

17 If we can go then to the response above. The email
18 above from Larry Doud. November 12, 2015, 11:47 to Julius
19 Morton: Juice, thanks for remembering that. I think in this
20 case it really justified that you elaborate. We really need to
21 act strongly here and take a leadership role. As I understand
22 it, this guy's been threatening us for a while so let's be
23 tough on him.

24 Can we have A54, please, placed before the witness,
25 your Honor and counsel.

M1PBDOU3 Pietruszewski

1 Mr. Pietruszewski, this is a thread of emails
2 concerning Specialty Care pharmacy update, correct?

3 A. Yes, that's what it says, yes.

4 Q. And it includes a report from Richie Cullen and responses
5 to Cullen's report regarding Specialty Pharmacy, correct?

6 A. Says Specialty Care pharmacy, yes.

7 MR. GOTTLIEB: Your Honor, I ask that this be received
8 in evidence.

9 THE COURT: Any objection?

10 MS. ROTHMAN: No objection.

11 THE COURT: It will be admitted into evidence.

12 (Defendant's Exhibit A54 received in evidence)

13 MR. GOTTLIEB: And published to the jury, your Honor.

14 THE COURT: Yes.

15 Q. Go to the second page, please, just briefly if we could
16 highlight Richie Cullen on April 25. On April 25 Richie Cullen
17 writes: Guys, the visit to Tony Semenitilli. Who is Tony
18 Semenitilli?

19 A. I think Tony Semenitilli is the owner I believe.

20 Q. The visit to Tony Semenitilli's stores over the last two
21 days was an eyeopener for both Carlos and myself. Yesterdays's
22 visit to the Crosby store went pretty much as we expected. The
23 blatant filling of prescriptions, regardless of the validity of
24 the doctor being checked out was rampant. The amount of cash
25 narcotic prescriptions being dispensed was grossly negligent at

M1PBDOU3

Pietruszewski

1 best. In my opinion had the supervising pharmacist James Amato
2 been allowed to do his job, two-thirds of these prescriptions
3 would have never been filled. And then it continues about the
4 rest of his finding. We don't need to read that to the jury.
5 But if we can go now to the response.

6 Your response on April 25 at 10:37 p.m. In response
7 to what he is providing to you. You write: Just remember who
8 wanted to cut them down to 12,000 units a month and wants only
9 4,000 units purchased every week for the first three weeks of
10 the month.

11 Also Total Care dispensed 21,000 units to the four
12 doctors in the Virey Group in March and Specialty, and
13 Specialty dispensed 19,000 units, same group in March. We need
14 to call Tony and tell him he must supply monthly usage. And if
15 not, we should consider cutting them off. Have a good night.

16 And the response right above that from Larry Doud to
17 Bill Pietruszewski, and if we could highlight that and put it
18 in yellow.

19 Larry Doud's response was: I agree with you, Bill, and
20 I would urge Jonathan to tighten their clamp regardless of the
21 deal we made for repayment.

22 And then right above that if we could now just go to
23 page 1 to the top on the bottom of page 1 there.

24 Richie Cullen in response to the same thread
25 indicates: I posed this option of dropping them from controls

M1PBDOU3 Pietruszewski

1 and narcotics to Tony and have them find another supplier.

2 Can you go to the email right above that.

3 You then respond. I'm sorry Larry Doud in response to
4 what you just said says: I agree with that. Who writes the
5 agreement?

6 And then the email right above that. You report on
7 April 26. Your response to Larry Doud is: I feel we need to
8 get a report back from Carlos on Monday or Tuesday. We then
9 ask Carlos to put on one page all requirements that both stores
10 need and have Tony sign off on this.

11 And then continuing above that. Larry Doud's response
12 to you on what you presented in this email to him.

13 He said: Sounds like a good plan, Bill. Thank you.
14 May we have A63 shown to the witness, your Honor?

15 THE COURT: Yes.

16 Q. Now, A63, Mr. Pietruszewski, this is some emails concerning
17 another pharmacy Aliton's Managed Care, correct?

18 A. It says Aliton's, yeah, and do not sell.

19 Q. I'm sorry.

20 A. It says Aliton's and do not sell, what was highlighted.

21 Q. These are emails concerning Aliton's and whether or not
22 they should be put on the, Do not sell list, correct?

23 A. Purchasing quantities of large controls.

24 MR. GOTTLIEB: Your Honor, I ask this be received in
25 evidence. I'm not even going to show it to the jury at this

M1PBDOU3 Pietruszewski

1 time.

2 THE COURT: Any objection?

3 MS. ROTHMAN: No objection.

4 THE COURT: It will be admitted into evidence.

5 (Defendant's Exhibit A63 received in evidence)

6 MR. GOTTLIEB: Looking at A78, just the witness, your
7 Honor. Looking at this thread, Mr. Pietruszewski, this has to
8 do with the continued compliance involving the Chemist Shop.
9 It's November, your Honor, 2015, involving you and others. I
10 ask that this be received in evidence, your Honor.

11 THE COURT: Any objection?

12 MS. ROTHMAN: No objection.

13 THE COURT: It will be admitted into evidence.

14 (Defendant's Exhibit A78 received in evidence)

15 MR. GOTTLIEB: If we could publish this to the jury,
16 please.

17 THE COURT: Yes.

18 Q. Now, again, without reading this because now it's in
19 evidence. It will be available to the jury. Looking at this
20 email, is it fair to say that it is being reported certain
21 results of the audit, the RDC audit, of the Chemist Shop and
22 certain concerns that were raised in the audit. Do you see
23 that?

24 A. Yes, I was looking. I'm sorry.

25 Q. It will probably be easier for me to point you to it.

M1PBDOU3 Pietruszewski

1 Looking at the page that is up from Joe Brennan. Highlight
2 Larry Juice called to go over.

3 This email indicates: Larry, Juice called to go over
4 his second audit at the Chemist Shop. He has real concerns.

5 And then it continues to indicate his concerns,
6 correct?

7 A. Yes.

8 Q. Now, if we can go just to page one after the back and forth
9 about this. If we could highlight from Larry Doud, his
10 response: Then please stop their controls. Please have them
11 send in their stock shares. Do not resell them, please.

12 Correct?

13 A. Yes.

14 Q. Finally in this group. If we can show the witness, your
15 Honor, A80.

16 Now, to the witness, this is Defense Exhibit A80.
17 This is an email from Larry Doud to you and to sales people,
18 June 14, 2016 pertaining to what you testified about on direct
19 about the possible change in the standard operating procedure,
20 correct?

21 A. I'm not sure. I see the email names if that is what it is.

22 Q. No. No. Now looking at what I believe is on the board?

23 THE COURT: Slow down.

24 MS. ROTHMAN: We object to this document, your Honor.

25 THE COURT: This is which one?

M1PBDOU3

Pietruszewski

MS. ROTHMAN: A80.

THE COURT: I'll admit it into evidence.

(Defendant's Exhibit A80 received in evidence)

MS. ROTHMAN: Your Honor, could we perhaps address this at the lunch break. I don't know how long Mr. Gottlieb has.

THE COURT: We're going to take the lunch break now.

Ladies and gentlemen, don't discuss the case. Keep an open mind. I'm going to give you a little bit of a longer lunch break. There's a bunch of issues I want to resolve, so we're going to have to take your time to do that.

I'll ask you to take your lunch break and we'll continue at 2:00 p.m. sharp.

M1PBDOU3

Pietruszewski

(In open court; jury not present)

THE COURT: Ms. Rothman, what's your objection?

MS. ROTHMAN: I think there's a couple. I mean, this is the defendant explaining the reason why they are going to move forward with the change about turning on stores before reviewing dispensing data. I think there's two issues.

The first is, it's the defendant testifying through a document, and I don't get the chance to cross-examine him with respect to the statements being offered for the truth. I think there's statements about the past successes of RDC. I think they're statements about the dividend in the bottom of the email. I'm speaking to it vaguely because I don't have an actual copy. The defense showed it to me. I think it was a late produced email, but I did review it.

"Bill tells me there are about 2 percent of the time we will stop shipping controls until we can get the issues resolved." That's a statement about the past, what RDC has seen when its done new account opening that the defense --

THE COURT: I'm sorry, where did you read from?

MS. ROTHMAN: The bottom of the second paragraph which says: "The compliance department will do our due diligence. And if everything is good, we will go forward. If there should be a problem and Joe tells me there are about 2 percent of the time, we will stop shipping controls until we can get the issues resolved."

M1PBDOU3

Pietruszewski

1 So that statement, "Joe tells me there are about 2
2 percent of the time," meaning problems with new stores, we will
3 stop shipping controls. That's a statement by Joe Brennan
4 about what he'd seen in the past about stores that RDC is
5 turning on and problems that have arisen.

6 THE COURT: The 2 percent statement?

7 MS. ROTHMAN: Yes. Joe tells me there are about 2
8 percent of the time. There being an artful reference to
9 problems with stores being turned on. That's a statement being
10 offered for the truth past looking about issues that RDC is
11 seeing with its stores.

12 And then the bottom paragraph talks about past
13 dividend returns, the success of RDC. Those are all statements
14 by the defendant being offered for the truth.

15 THE COURT: Why is that being offered for the truth?
16 Who cares what the dividend is?

17 MS. ROTHMAN: I think it should be redacted. It's
18 irrelevant. I'm not sure what the relevance is to get that
19 statement in.

20 THE COURT: You can't have it both ways. It is
21 hearsay or it's not relevant.

22 MS. ROTHMAN: I think it's different problems with
23 different parts of the emails.

24 THE COURT: That's what I'm trying to understand.
25 What's the objectionable part of that statement? Why do you

M1PBDOU3 Pietruszewski

1 object to that statement?

2 MS. ROTHMAN: About the dividend?

3 THE COURT: Yes.

4 MS. ROTHMAN: I don't think it's relevant.

5 THE COURT: How is that going to somehow mislead the
6 jury?

7 MS. ROTHMAN: I don't think it's relevant.

8 THE COURT: That wasn't the original argument you
9 made.

10 MS. ROTHMAN: I think Larry Doud's view of how to do
11 compliance by turning on stores more quickly leads to the
12 success of the company, so it's improper to put before the jury
13 facts about the success of the company. My concern in this
14 email is really --

15 THE COURT: You're going to put in even higher numbers
16 than that, aren't you, in your chart?

17 MS. ROTHMAN: We're not going on the defendant's words
18 to do that.

19 THE COURT: Technically I understand your argument
20 that you're not doing it using the defendant's words, but it
21 doesn't support your relevance argument because you say that
22 the dividend that -- matter of fact, it seems to be in dispute
23 with regard to the experts, and you say the dividend is a
24 significantly relevant issue to this case.

25 MS. ROTHMAN: There's a couple of problems. Maybe I

M1PBDOU3

Pietruszewski

1 can step back and go step by step. I have a problem with the
2 entire email and that the defendant should not be able to put
3 forth his own explanation for why he's putting forth a change
4 in due diligence that they don't report to the DEA.

5 THE COURT: I don't accept your basic premise that's
6 been throughout your objection. That's not true. The
7 defendant has the right if there's evidence out there of what
8 he was doing at the time, whether he was taking actions or
9 making statements that were in furtherance of a conspiracy or
10 he was taking actions or making statements that he contends
11 were not consistent with being in a conspiracy.

12 You say the things that you want to offer against him
13 are consistent with being in a conspiracy. He argues that
14 there's other evidence out there in fairness that juries are
15 entitled to know. This isn't a statement he was making when he
16 was being interviewed by police officer investigating this
17 case. It's in the course of his business dealings with other
18 individuals at a time when you claim that the only thing he
19 could be doing is either saying these things aren't true or to
20 cover up his conspiracy.

21 The defense argues that, well, look, you would expect
22 there would be different statements that he was making at the
23 time if his knowledge and intent was to be involved in criminal
24 conspiracy. I don't understand why that's not relevant. I
25 understand your technical arguments, but I don't understand why

M1PBDOU3

Pietruszewski

1 that's not a central issue in this case. As you say, did he
2 act like a guilty person or did he act like an innocent person.
3 That's a crucial issue.

4 MS. ROTHMAN: Maybe I can zoom in and then zoom out.
5 Looking at a particular line that I have a problem with which I
6 think is hearsay which the same way you've articulated why you
7 might let in some of Mr. Doud's statement should not apply
8 here.

9 Joe tells me there are about 2 percent of the time,
10 meaning there are problem stores about 2 percent of the time.
11 That's a statement being offered for the truth that should not
12 come in evidence.

13 THE COURT: I'm not sure why that's being -- who cares
14 whether it's two, four?

15 MS. ROTHMAN: What I expect the defense is going to
16 argue is that this change of doing due diligence after --
17 reviewing dispensing after we turn on accounts, isn't a problem
18 because we're only seeing issue with a small percent of stores,
19 and so we can get the stores on more quickly.

20 THE COURT: Except you want to offer evidence that you
21 say clearly refutes that and puts the lie to that statement.

22 MS. ROTHMAN: But our proof isn't hearsay. Our proof
23 is admissible. This is hearsay. Joe Brennan could be lying
24 about this fact. And they're going to argue to the jury,
25 there's no problem because as Joe Brennan said, only 2 percent

M1PBDOU3

Pietruszewski

1 of the time there's issues, meaning it's a valid business
2 judgment.

3 Just as your Honor kept out statements about Linden
4 Care because they assumed the truth, your Honor should keep out
5 that statement by Joe Brennan about there only being problems 2
6 percent of the time.

7 THE COURT: What I don't understand is, how does it
8 make it more or less likely that you have proof of his
9 involvement in a conspiracy depending on whether this is 2
10 percent or whatever number you claim it is. Why does it
11 matter?

12 MS. ROTHMAN: Your Honor, I don't think the defense
13 should be able to offer justifications for Mr. Doud's actions
14 when they're hearsay.

15 THE COURT: I'm glad you put it that way. The answer
16 to that question is, yes, he does have the right to do that.
17 He has the right to indicate what he did during the time that
18 you claim he was involved in a conspiracy and if he was taking
19 actions or saying things at the time. The jury has the right
20 to examine those to determine at a time when he believed he was
21 engaged in a conspiracy before he was caught, he was making
22 statements that were either consistent with or inconsistent
23 with his guilt or innocence.

24 That doesn't matter. It doesn't matter whether it's
25 true or not. The question is, How did he act? Did he act like

M1PBDOU3

Pietruszewski

1 a guilty person and did he make statements that a guilty person
2 would make? Did he have conversations that a guilty person
3 would have, or did he have conversations that at least would
4 give someone the impression that he's trying to either
5 legitimately or illegitimately indicate that he's not involved
6 in criminal activity.

7 I can't accept your premise that you could offer every
8 single statement that hurts him, against him at the time, but
9 he cannot offer any other statements at the same time that are
10 reflective of innocence, that the only way he can offer that is
11 to get on the witness stand, because the jury doesn't care
12 whether it's 2 percent or 3 percent. They can about the nature
13 of the communication of whether or not he's talking to people
14 perfidiously, whether he's hiding information, whether he's
15 pretending like he's really doing the right thing. Those are
16 the things that the jury needs to evaluate, and I don't
17 understand why the substance of 2 percent is at issue for you.

18 MS. ROTHMAN: Your Honor, I think the problem we have
19 is that the defense is putting in now several self-serving
20 statements which under the rules of evidence they're not
21 allowed to do.

22 THE COURT: That's not true the way you just said it.
23 You meant to say that you believe he was putting forth
24 self-serving hearsay, but there's no rule that says he can't
25 put in self-serving statements.

M1PBDOU3

Pietruszewski

1 MS. ROTHMAN: What if Joe Brennan had actually told
2 Larry Doud, 98 percent of our stores are bad. We have to do
3 due diligence first, otherwise we're turning on all of these
4 pills.

5 THE COURT: And the jury's relevant question would be,
6 How did Mr. Doud react to that information, not whether that
7 information is true. It's how does he react? If Mr. Doud
8 says, no problem. Let's go to lunch. That means one thing.
9 If he says, oh my God. We better hide this stuff. That means
10 something different. It doesn't matter what's true. It
11 matters how the jury interprets those comments and those
12 actions.

13 I understand what you're saying is that, oh, well, he
14 shouldn't have the benefit of this sounding like he's just
15 trying to come up with a good legal explanation for what he's
16 doing. Well, I mean, that's true, but you put the lie to that
17 by showing his activities that are inconsistent with the
18 statements that he's making at the time.

19 The defendant doesn't -- what he doesn't have the
20 opportunity to do is to argue to the jury, Because I said it,
21 it must be so. But he has the right to say, well, look at my
22 conduct. Look what I did. Did I act like I was trying to
23 commit a crime? Did I make statements that you would expect me
24 to make if I was involved in criminal activity with these
25 people if I was involved in a conspiracy to commit crimes?

M1PBDOU3

Pietruszewski

1 That's what the jury needs to evaluate.

2 As you say, sure, whatever statement he made at the
3 time during the conspiracy that indicates that he had the
4 guilty knowledge and intent, you have the right to point that
5 out. But he has the right to say, look, I didn't act like I
6 was a guilty person. I acted like I was an innocent person at
7 a time when I had no reason to believe that anybody was
8 accusing me of any crime. That's the relevance of it.

9 My position has been the same throughout with this
10 case is that you can't simply say because it's self-serving and
11 characterizing it as self-serving hearsay that means the jury
12 doesn't have the right to examine in total how he responded to
13 these incidents. The reality is, if you have a reasonable
14 explanation why a guilty person would have acted this way and
15 said these things, then that should support the government's
16 case.

17 If they want to argue that, no, the government doesn't
18 have a reasonable explanation as to why he's saying all these
19 things that had nothing to do with committing a crime and don't
20 indicate what you would expect from a person who's committing a
21 crime, they have the right to argue that and try to convince
22 the jury of that. I don't see just because your position is
23 that if the defendant -- he wrote an email and the email says,
24 oh, no, we're not -- we can't do that because that would be
25 against the law. Your argument would be that the jury doesn't

M1PBDOU3

Pietruszewski

1 have the right to hear that except if he takes the witness
2 stand. I don't agree with that.

3 If you're offering every single bad email, you can't
4 say that you get to give the jury an impression that there are
5 only bad emails and then not also good emails and have a
6 reasonable explanation for the jury as to why they exist and
7 why that's not inconsistent with the defendant still being
8 guilty of the crime. I don't accept that premise.

9 I think I understand the nature of your objection and
10 I think it's been consistent and I've considered it, but I
11 don't think, no, the defendant -- if you have emails that you
12 want to use against him and he has other related emails,
13 similar emails that indicate -- that he wants to argue from
14 that reflect his knowledge and intent at the time, he has the
15 right to offer those and has the right to say, look, this exist
16 out there. I'm not making this up now. This isn't a recent
17 fabrication for me.

18 Whether or not I was still -- I was committing a
19 crime, was trying to cover it up at the time by acting like I
20 was an innocent person, that's an argument that you can make.
21 To simply say that if the defendant says -- if the defendant
22 were to say in one of these emails -- if someone had sent him
23 an email saying, let's break the law by selling drugs and you
24 put that email in, it is not a legitimate argument that he
25 can't put in the email response that says, No, we're not going

M1PBDOU3

Pietruszewski

1 to sell drugs because that's against the law. It's not the
2 argument that's self-serving hearsay and he can't put that in
3 unless he takes the witness stand.

4 MS. ROTHMAN: That may come in under 106, Rule of
5 Completeness. I understand your Honor's ruling, and as Mr.
6 Gottlieb said, I respectfully disagree. I have one question
7 and then I will stop. Would you agree that it would be
8 inappropriate for the defense to argue this business change
9 wasn't a big deal because Joe Brennan told you only a small
10 percentage of the stores had problems. Would that be
11 inappropriate?

12 THE COURT: Say that again.

13 MS. ROTHMAN: For the defense to argue, this business
14 change in 2016 of turning on stores before reviewing dispensing
15 wasn't a big deal, wasn't criminal because only 2 percent, a
16 small percent of the stores had problems?

17 THE COURT: No, I don't think he can make that
18 argument. I don't think they've offered any evidence that the
19 jury can accept for its truth, and that's not the case.

20 Now, if somebody else gets on the stand and testifies
21 to that, that's something else. But, no, I don't think he is
22 in a position to argue that unless -- not from this document.
23 That's all I'm saying. Clearly not from this document.

24 MS. ROTHMAN: Could he redact that line from this
25 document? My concern is that's going to go before the jury and

M1PBDOU3 Pietruszewski

1 they're going to make that argument.

2 THE COURT: No, because I don't think that the jury --
3 I think it's unfair to make the jury think that there's
4 something in this document that they should not see. I don't
5 think that's an appropriate way. There's no reason to redact
6 this. You have direct evidence. As a matter of fact, doesn't
7 one of your charts directly address this issue?

8 MR. ROOS: You mean that came in last week?

9 THE COURT: It's going to come in through your expert.

10 MS. ROTHMAN: About the percentage of stores with
11 problems?

12 THE COURT: Yes.

13 MR. JANEY: Yes.

14 THE COURT: Don't you have a chart on that and you
15 have direct expert testimony?

16 MR. ROOS: Not on the new customer issue. There is
17 expert testimony on the overall customers. So your Honor is
18 right that we will have data relating to all the customers.

19 THE COURT: Well, my position with regard to that
20 issue is this: You have the right to point to the evidence in
21 this case and emphasize to the jury that the evidence supports
22 your position and doesn't support the defense's position, and
23 you have full opportunity to do so.

24 And if they get up there and they want to say, oh,
25 it's only 2 percent, you have the right to say, yeah, the only

M1PBDOU3

Pietruszewski

1 person that said that is Mr. Doud, the person who has the
2 greatest interest in this case. And they don't need an
3 instruction from me. They don't even need an expert opinion on
4 that.

5 The jury is common sense and the jury can evaluate
6 that. As they say, I sort of have a basic rule of ultimately
7 evaluating admissibility, if you can't win your case without
8 this, then you shouldn't have brought this case. You should be
9 confident enough that you have the evidence to be presented and
10 it's being presented to the jury to overcome what you contend
11 are irrelevant, flimsy arguments and you have the full
12 opportunity to do that. You know all these facts and you still
13 think the defendant is guilty.

14 If you give all those facts to the jury, I assume you
15 assume that a reasonable juror would think the same thing. I
16 think that this whole thing about because a statement that the
17 defendant makes that he wants to use that was made years ago
18 may help him because it doesn't -- that statement doesn't
19 reflect a guilty mind or guilty conduct, that's not a reason to
20 keep that out of the case.

21 I think that with regard -- I think in the total
22 context -- and I'm also thinking this in the total context of
23 what you want to offer through your expert -- and what I need
24 to do is, I need to focus. We're going to come back a little
25 early from lunch and maybe we'll take a little more, five or so

M1PBDOU3

Pietruszewski

1 minutes now, this is what I need from the defense. I need to
2 know which charts you're objecting to. I do have that. I need
3 to know whether or not you're objecting to the chart as being
4 inaccurate or you're objecting to the chart being misleading.

5 I need to know besides the charts that you're
6 objecting to, I need to know what specific testimony, whether
7 it's an objection to the chart, whether it's an objection to
8 the chart being accurate or whether it's an objection to the
9 chart being misleading or is it an objection to what you
10 anticipate the testimony is going to be and what you object to
11 the testimony.

12 For example, I'll start out with -- and obviously I've
13 looked at these exhibits and I have some views as to what these
14 exhibits are suppose to be showing -- for example, you object,
15 defense objects to chart Exhibit 903, chart page 12.

16 MR. JANEY: Your Honor, if you can refer me based on
17 the exhibit.

18 THE COURT: 903.

19 MR. JANEY: We organized the different documents by
20 exhibit number.

21 THE COURT: Exhibit 903, page 12 of Exhibit 903. That
22 should be the annual compensation salary. You have it as a
23 different number.

24 MR. JANEY: We organized them Exhibit 1 through 7, but
25 I'm with you.

M1PBDOU3

Pietruszewski

1 THE COURT: Is there anything about this chart that
2 you contend is false?

3 MR. JANEY: No.

4 THE COURT: That's the first thing. You're not
5 objecting this chart is an inaccurate representation of his
6 compensation.

7 MR. JANEY: On 903, your Honor? 903 is overview of
8 the pharmaceutical.

9 THE COURT: I have Dowd's annual compensation and
10 salary and bonus. You identified it as page 12 and you said
11 you objected to 12 through 20 I think, so that's why I'm asking
12 you. Maybe that's not where you wanted to point my attention.

13 MR. JANEY: I have it as page 10, Doud's annual
14 compensation salary and bonus, 09-2017.

15 THE COURT: Is there anything about that chart that is
16 factually inaccurate?

17 MR. JANEY: Yes.

18 THE COURT: What is it about the chart that is factual
19 inaccurate?

20 MR. JANEY: The percentage of allocation of Mr. Doud's
21 bonus from controlled sales.

22 THE COURT: Where is that?

23 MR. BURNETT: It's not on that chart.

24 THE COURT: What on this chart is inaccurate?

25 MR. JANEY: I understand. From that standpoint, no,

M1PBDOU3 Pietruszewski

1 your Honor.

2 THE COURT: You're not arguing about this chart being
3 inaccurate. You're arguing about it being misleading?

4 MR. JANEY: Yes, your Honor.

5 THE COURT: That's what I'm trying to focus on. If
6 this chart is factually accurate, why is this inadmissible?

7 MR. JANEY: The argument -- and I think that we put
8 this in our cover brief, your Honor, our argument here isn't
9 that the numbers are inaccurate. Our argument is this is a
10 misleading chart, one. And two, what we also argue --

11 THE COURT: In what way is it misleading? If it's
12 factually accurate, in what way it is misleading?

13 MR. JANEY: We anticipate -- this goes to one of your
14 Honor's question, we anticipate that this is a foundational
15 chart to set up the testimony about Mr. Doud's -- allocation of
16 controls sales to Mr. Doud.

17 THE COURT: You're not objecting to the chart, you're
18 objecting to the testimony?

19 MR. JANEY: Yes, Judge. But going back to the chart,
20 what we also say and the government responds to it in the
21 filing they made last night, we object to the timeframe that is
22 exhibited in the chart. The chart describes Mr. Doud's bonus
23 from 2009 to 2017. We say beyond 2012 is irrelevant to this
24 case.

25 THE COURT: All right. That's what I understand too.

M1PBDOU3

Pietruszewski

1 My first focus on any of these exhibits, particularly these
2 demonstrative exhibits as you described them is whether or not
3 this is somehow an inaccurate representation of the facts, and
4 you're saying to me that there's nothing on this chart that you
5 claim is inaccurate or false?

6 MR. JANEY: Yes, your Honor.

7 THE COURT: You say that any testimony -- you say that
8 the timeframe is too broad?

9 MR. JANEY: Yes.

10 THE COURT: And you say that any testimony that goes
11 along with this -- and I'm not sure which testimony you say
12 goes along with this that's going to be inadmissible.

13 MR. JANEY: I'm making an assumption. But what I
14 believe is that this is a foundational chart. This would be
15 the initial predicate of setting up, these were the numbers
16 that Mr. Doud earned with respect to his bonus and overall
17 compensation. The follow-up question that the government, we
18 anticipate, will then get to either as the next question or the
19 one after is, What components of Mr. Doud's bonus is allocated
20 or driven by the controlled sales percentage.

21 THE COURT: That's not on this.

22 MR. JANEY: That's not on this chart.

23 THE COURT: Your objection to the chart itself, your
24 only articulable objection to the chart itself is that the
25 chart covers a timeframe that you think is irrelevant?

M1PBDOU3

Pietruszewski

1 MR. JANEY: Yes. If I can elaborate on that point for
2 the moment. The government says that's wrong. The expert
3 needs to go back to 2009 in order to demonstrate how Mr. Doud's
4 bonus scaled up during the development or growth of controlled
5 substance. That argument doesn't make any sense. Even by the
6 evidence that's been admitted before this jury, the controlled
7 substances sales are really taking off in -- first growth in
8 2014, but really in 2015 and 2016.

9 THE COURT: Let me make sure I understand what you're
10 arguing because you think that you're better off if this chart
11 only starts in 2013 as opposed to 2009?

12 MR. JANEY: We give them 2012.

13 THE COURT: You think you're better off if this chart
14 is limited to 2012 as opposed to 2009.

15 MR. JANEY: From my perspective, yes, your Honor.

16 THE COURT: Why?

17 MR. JANEY: I don't think that what Mr. Doud earned in
18 2009 is probative in any way as to whether he was motivated by
19 bonus compensation during the timeframe of the conspiracy. And
20 I don't need, from the defense perspective, to show that he
21 made fewer dollars in '09, '10, '11, which is totally
22 irrelevant and not probative.

23 THE COURT: You don't think that you want to be in a
24 position to argue that his income was trending that way even
25 before?

M1PBDOU3

Pietruszewski

1 MR. JANEY: I don't need that argument, your Honor.
2 And the idea that the expert needs to look that far to the
3 left-hand side --

4 THE COURT: How are you prejudiced by this chart?

5 MR. JANEY: Well, one -- my first argument, your
6 Honor, is that it's not probative. It's not probative of the
7 government's theory which is that he was motivated by greed
8 during the timeframe of the indictment. Those earlier years
9 are not probative of what's at issue in this trial.

10 THE COURT: How are you prejudiced?

11 MR. JANEY: It shows, look at all the money this guy
12 made.

13 THE COURT: In 2014 he made \$899, 000. You mean all
14 the money he made. If anything, he made less than half of that
15 in 2009. That's prejudice to your client?

16 MR. JANEY: In 2009, if you start adding it up --

17 THE COURT: -- he made 154, 000.

18 MR. JANEY: It's the impression.

19 THE COURT: He made less than you. How does that
20 prejudice him?

21 MR. JANEY: Your Honor, the chart gives the impression
22 of look at the scaling up of all of the money accumulated by
23 this man.

24 THE COURT: As opposed to if the chart only starts in
25 2013 and it indicates he made three-quarters of \$1 million in

M1PBDOU3

Pietruszewski

2013, and then it shows that's he made twice as much of that in 2015 and 2016.

MR. JANEY: Your Honor --

THE COURT: That's a more accurate picture of what's going on here.

MR. JANEY: The subtext I think, and I don't --

THE COURT: It's the subtext that's important, isn't it?

MR. JANEY: Well, the subtext that I feel toward the energy from your Honor if I may say is, Are you sure that you want to say that because the government -- You sure you want to confine it to that period because the government is saying that he made all this money because of controlled sales allocating to his compensation and bonus. And what I'm saying is that our expert is going to say, that's not what occurred.

THE COURT: You don't intend to elicit -- and because if I rule, it's not coming in. It's not coming in from either side. You don't intend to elicit what his salary range was in 2011 or 2010 or 2009?

MR. JANEY: Absolutely not. The timeframe of this indictment is 2012 to 2017.

THE COURT: Okay. Your argument with regard to this chart is solely that to go back before 2012 is irrelevant?

MR. JANEY: As to the chart itself, yes, your Honor.

THE COURT: Okay.

M1PBDOU3

Pietruszewski

1 MR. JANEY: Your Honor, the Court has heard my comment
2 about what I believe this chart serves as the predicate of the
3 setup of testimony. Even if it's not the actual words that
4 come out of his mouth, it's the impression of what is left
5 unspoken by the expert when he starts talking about the bonus
6 allocation. That's the problem with demonstrative exhibits.

7 THE COURT: No, depends on what I let in. If his
8 testimony is that his salary increased significantly during
9 this period of time and a portion of that was attributable to
10 the increased sales of controlled substances, what's wrong with
11 that?

12 MR. JANEY: Can you say the last sentence again, your
13 Honor.

14 THE COURT: Part of that increase was the increase in
15 the sales of controlled substances.

16 MR. JANEY: Because the defense's position, if I can
17 make three -- four comments about that, your Honor. That is
18 factually inaccurate.

19 Now, whether that -- and if I can just say.

20 THE COURT: It may be disputed, but I'm not sure how
21 it's factually inadequate.

22 MR. JANEY: There's a mathematical formula. This is
23 science. It is something that can be known as to whether the
24 allocation is true or not.

25 THE COURT: The only difference I see is that you want

M1PBDOU3 Pietruszewski

1 to use the post-profit numbers and they say that his agreement
2 says, no, you use the pre-profit number.

3 MR. JANEY: If that's something that we can -- if that
4 ends up be being left up to cross-examination, we'll deal with
5 that.

6 THE COURT: That's what I'm trying to understand.

7 MR. JANEY: I've read the government's summary from
8 last night, your Honor this morning. I think that the
9 government misreads the formula.

10 THE COURT: Because you say the expert -- because you
11 disagree with the expert, that's not a basis --

12 MR. JANEY: I understand and I've observed during the
13 course of this trial, I'm not trying to make Mr. Burnett's head
14 move anymore than it already is potentially separating from his
15 shoulders. Where I'm permitted --

16 MR. BURNETT: I'm just sitting here.

17 MR. JANEY: I get it. Those sorts of things are
18 subject to cross examination. I understand, but I think that
19 the Court has heard my argument with respect to this slide.

20 If I can say one other thing, your Honor, because this
21 is something -- if you'll permit me, it's very, very important.
22 We have raised the issue about this expert in written
23 submissions to the Court during the *motion in limine*. We have
24 raised the issue about these slides on the first day of the
25 trial. I raised it on the record.

M1PBDOU3

Pietruszewski

1 The reason I say that, your Honor, if I can be
2 permitted because this isn't a digression. The government's
3 submission late last night suggest that the defense is playing
4 games by submitting this writing challenging these slides in
5 what is described as the 11th hour. That's just not the case,
6 your Honor. The government has submitted endless 11:50 p.m.
7 submissions with witnesses on the witness stand. That's not
8 what this is about.

9 THE COURT: That's not what this is about for me, so
10 I'm not focused on that. I'm focused on what are your
11 legitimate objections.

12 For example, I have exhibit page 17 which is supposed
13 to be the shipment of oxycontin and fentanyl orders that had
14 been flagged. What is inaccurate about that chart, or is this
15 a similar argument that you're making that, well, we just don't
16 like the chart in conjunction with what we anticipate the
17 testimony is going to be?

18 MR. JANEY: Here, your Honor, and what we say in our
19 submission is the chart is misleading.

20 THE COURT: So it's not inaccurate?

21 MR. JANEY: I'm not sure.

22 THE COURT: You should be sure at this point. If
23 you're not sure, you can't make that argument. If you're not
24 sure, I'm not sure, and I won't give you a ruling on that
25 basis.

M1PBDOU3

Pietruszewski

1 MR. JANEY: I was being inartful, your Honor.

2 THE COURT: But it's not inaccurate?

3 MR. JANEY: It doesn't appear to be inaccurate, but it
4 is confusing and misleading. To elaborate on that, your Honor,
5 the chart -- and I'm also relying on the government's comments
6 from yesterday where -- and in the government's letter
7 submission of last night -- the government is suggesting that
8 there's testimony before this jury where a pharmacy has orders
9 above the threshold of 30 percent, that that has been a red
10 flag that's been commonly described.

11 THE COURT: Hasn't everybody who testified in this
12 case said that that's what they use under their procedure as a
13 red flag?

14 MR. JANEY: I haven't heard 30 percent. What I heard
15 is a number higher than at times 10.

16 THE COURT: I heard a number less than 30 percent. I
17 didn't hear a number over 30 percent. Who said over 30 percent?

18 MR. JANEY: I don't think anyone has. I'm looking at
19 the chart. I don't think anyone said 30 percent. I'm looking
20 at the chart. This is the same issue that I raised yesterday.

21 THE COURT: You just said the chart is not inaccurate?

22 MR. JANEY: It's confusing and misleading.

23 THE COURT: But it's not inaccurate, so don't say look
24 at the chart. I can't look at the chart and glean what your
25 argument is because it's not on the chart. You say those

M1PBDOU3 Pietruszewski

1 numbers on the chart are accurate.

2 MR. JANEY: What I was about to describe, your Honor,
3 is how I believe the chart is confusing and misleading.

4 THE COURT: I'm going to give you further opportunity
5 to argue that. I'm just trying to focus myself first because I
6 don't want to spend a lot more time on going through all of
7 these charts and ask you the same question.

8 To the extent that you have an objection to the chart
9 because the chart you say is factually inaccurate, then I want
10 you to identify that for me right away, not now, when we come
11 back. Identify that for me so I can address that. If that's
12 not your argument, then I can put that part of it aside.

13 And you have a different kind of an argument to make,
14 and obviously a more difficult argument to make when you say
15 the chart itself is not factually inaccurate, but you want to
16 keep it out because you think it's misleading. Well, that's
17 what a trial is for, isn't it? It's for you to dispute what
18 the jury should conclude from those facts if those facts are
19 accurate.

20 So it doesn't mean that you get to kick out every
21 chart that you say is accurate because you don't want them to
22 make an argument that you say that the jury should reject.

23 (Continued on next page)
24
25

M1P3DOU4

1 MR. JANEY: I understand, and that's not the
2 objective, your Honor. I want to envision a scenario where the
3 defense argues that a chart is confusing, misleading and/or
4 unfairly prejudicial, and the chart has to be changed.

5 THE COURT: Right. Right. But it's difficult for me
6 to understand your argument that the chart is accurate, but
7 misleading.

8 MR. JANEY: Well --

9 THE COURT: Now, you know, put aside the testimony.
10 The testimony that goes along with the chart, you may argue to
11 me is either inaccurate or misleading, but because there is
12 anticipated testimony about the chart, it doesn't make the
13 chart itself inadmissible, because you say you don't like the
14 testimony that goes along with the accurate chart.

15 MR. JANEY: Certainly, your Honor has in other
16 cases --

17 THE COURT: Done what?

18 MR. JANEY: Has determined that charts, where even
19 accurate information is on the page, is organized in such a way
20 that it is misleading or confusing to the jury.

21 THE COURT: All right. But you don't make that
22 argument here. You don't make the argument that the chart is
23 organized in a way that the chart is misleading. The only
24 misleading part of this you say is the testimony. That doesn't
25 make the chart, it may mean you can convince me they shouldn't

M1P3DOU4

1 be able to make certain arguments about the chart, or shouldn't
2 be able to rely on the chart for that conclusion, or you should
3 be able to argue to the jury that they shouldn't reach that
4 conclusion. But, I don't know why you say, if they put out a
5 chart that says the point they want to make is that during the
6 period of time when they claim that there was a conspiracy to
7 sell as many opioids as you possibly can, and that was
8 motivated by Mr. Doud's own self-interest and monetary gain,
9 and they want to show a chart that is consistent with the fact
10 that when he was selling opioids, he was making more money than
11 when he wasn't selling opioids. And the jury should conclude
12 that that's consistent with his guilt, not consistent with his
13 innocence.

14 MR. JANEY: I don't -- well --

15 THE COURT: How does that make the chart inadmissible?

16 MR. JANEY: Your Honor, with that example, if I can
17 just say three things. One, I agree with you. I opened up and
18 made that very statement in my opening statement. So clearly,
19 I don't have an objection to that. The third point that I
20 would make is, perhaps I misunderstood. I thought you told me
21 to wait on my argument.

22 THE COURT: I did.

23 MR. JANEY: As to whether it is misleading.

24 THE COURT: I'm trying to focus you because I'm not
25 sure you are going to come back on a solid argument on this

M1P3DOU4

1 unless you understand exactly where my concern is. My concern
2 is you want me to keep the chart out, because you don't like
3 the testimony that goes along with it.

4 MR. JANEY: In the first instance, your Honor, my
5 argument would always be that such a chart where I have that
6 type of objection should be precluded. Now, if the government
7 then responds by saying, listen, we can make modification to
8 the chart, it is not for me to make that argument on behalf of
9 the government. It is for the government to the say, listen --

10 THE COURT: It is for you to make the argument that
11 would convince me that the chart itself is inadmissible.
12 Because, what you're saying is that to solve your problem is
13 not changing the chart. What you are saying would solve your
14 problem is changing the testimony.

15 MR. JANEY: Well, no. What I would say, and I'm now
16 venturing into what your Honor has asked me to wait to do, so I
17 want to be clear, I would suggest on the one chart that you
18 asked me about, 904, that the chart should be organized in a
19 way that doesn't make it misleading.

20 THE COURT: In what way would that be?

21 MR. JANEY: The first column on the horizontal axis of
22 the chart, where it says controlled substance share of sales
23 30 percent is confusing and misleading.

24 THE COURT: You say that's accurate.

25 MR. JANEY: Your Honor, when you look at this chart,

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1 it is the same thing that I said yesterday. When you look at
2 this chart, it is true in fact that it is trying to sum up --
3 this is a summary chart, right. So it is being used, in
4 addition with the chart, similar charts behind it, like 905
5 from Ullmann Pharmacy, it's summarizing all of these total
6 sales.

7 THE COURT: It is summarizing those facts.

8 MR. JANEY: Those numbers, the veracity of those
9 numbers aren't in question. But when the summary is presented
10 in this way, it is suggestive that in that line that these
11 numbers are all of these grossly ridiculous numbers.

12 THE COURT: You don't think you are capable of
13 explaining to the jury that's not the case?

14 MR. JANEY: Your Honor, I can. And I believe that I
15 can. But, the reason that we have the doctrine of confusion,
16 of jury confusion and misleading is so a determination is made
17 where the cross-examination isn't bogged down and takes two
18 hours in order to clear up all these charts.

19 THE COURT: You think it is confusing and unfair for
20 the government to have a chart that indicates that the time
21 period that Mr. Doud made the most money was the time period he
22 was selling opioids?

23 MR. JANEY: Now we're talking about two different
24 charts. We're talking about different charts.

25 THE COURT: I just went back to the first chart.

M1P3DOU4

1 MR. JANEY: The first chart, your Honor, my objection
2 is about the time frame.

3 THE COURT: So why, what is the objection that you
4 have to the chart that indicates the sales order of interest
5 and dispensing data as to these pharmacies? Is there something
6 wrong with that chart? Is that chart inaccurate?

7 MR. JANEY: The chart is not, your Honor. It would go
8 into the realm of testimony of the anticipated testimony that
9 we would anticipate from the witness.

10 THE COURT: I guess this is what I want to focus you
11 and then we can take a lunch. What is it you want me to limit
12 the expert, in what way do you want me to limit the expert to
13 not say what?

14 MR. JANEY: The expert cannot, for reasons I can
15 elaborate, cannot opine on why those orders of interest were
16 stopped, the underlying reasons, whether he knows whether they
17 were on hold for periods of time and then released, the
18 circumstances under which that occurred. He can only
19 testify --

20 THE COURT: I don't know if he can testify to that.

21 MR. JANEY: If I can continue without interruption.

22 MR. BURNETT: He's not going to do that.

23 THE COURT: The government just wanted to toss in he's
24 not going to do that.

25 MR. JANEY: That's great. The government also gave us

M1P3DOU4

1 96 slides and for the first time last night and said he is only
2 going to testify potentially to some of them.

3 THE COURT: I guess the last part of what you need to
4 focus for me, focus on whether it's inaccurate, or accurate but
5 misleading. Or whether you object to the chart, object to the
6 testimony, also indicate to me what it is that you say that,
7 based on the evidence in this case, and the charts that are not
8 misleading, without misleading testimony. What is it that you
9 want to limit the government in the way they argue what
10 conclusions that the jury should draw from these charts,
11 because a lot of this is not expert testimony. It is common
12 sense. Okay. And common sense, inferences, as I will instruct
13 them with regard to cases, it is inferences that they could but
14 are not required to draw with regard from the facts as they
15 find them.

16 So if you are trying to tell me that I should not just
17 limit the testimony of this witness, but the government should
18 be precluded from making certain arguments, and particularly
19 that they should be precluded from making certain arguments
20 because you want me to tell the expert he can't say it, so the
21 government won't have it in the case to argue.

22 So, I need you to focus on those issues. You have not
23 made, as you can tell, you've not made even in the abstract a
24 compelling argument to toss out exhibits if you keep telling me
25 the exhibits are factually accurate. That's not the solution

M1P3DOU4

1 to your problem, to throw out the factually accurate exhibits.
2 If you are just afraid of what conclusions that the expert or
3 the government is going to argue to the jury that they should
4 draw from those slides.

5 MR. JANEY: I understand and I will focus my comments
6 after the lunch on the testimony and on the government's
7 argument aspect. I will take a look back at what we provided
8 last night to the Court or yesterday evening, and I'll deal
9 with the things in that order. I am afraid of very few things,
10 your Honor.

11 THE COURT: I can tell you my initial reaction to
12 this, that there may be some particular change headings that
13 can be appropriately changed in order to not be misleading. If
14 those headings are modified to describe the chart factually,
15 rather than describe the expert's opinion. And you would have
16 to spell out for me, I don't think that makes either the chart
17 or the expert's testimony necessarily inadmissible.

18 MR. JANEY: I'm not suggesting that the expert's
19 testimony in the main as a whole is inadmissible, your Honor.
20 We're not trying to, and I think we've all moved beyond it
21 during the course of this trial. We are not trying to preclude
22 the government's expert. That's not where the dispute is here.

23 THE COURT: I had focused, I think I've understood
24 that and focused on the fact that your submission primarily
25 deals with the exhibits.

M1P3DOU4

1 MR. JANEY: Yes, your Honor.

2 THE COURT: Saying you think these exhibits should not
3 be admitted in evidence. And I'm trying to figure out if the
4 exhibits are accurate, what would preclude the exhibit. And to
5 say that there is certain testimony you don't want to hear
6 along with the exhibit isn't particularly compelling to exclude
7 the exhibit. Or, I guess if you can convince me that the
8 government should be precluded from making a particular
9 argument, and that argument would be based solely on an
10 exhibit, maybe the exhibit is totally irrelevant, I say they
11 can't make the argument.

12 But based on the leeway I've given the defense with
13 regard to the individual sales and transactions with certain
14 pharmacies, and now the government wants to show that despite
15 your anecdotal evidence, they have statistical evidence that
16 shows something to the contrary, they have the right to do
17 that.

18 MR. JANEY: We are not trying to preclude the expert.

19 THE COURT: All right.

20 MR. JANEY: I want to be very clear about that.

21 THE COURT: In that vein, then after lunch you come
22 back and tell me what it is you are trying to preclude and why
23 based on the parameters we've just finished. You just said to
24 me you are not trying to preclude the expert. You stated to me
25 there is nothing wrong inherently with the exhibit. So I'm not

M1P3DOU4

1 quite sure how I can help.

2 MR. JANEY: Okay, your Honor. I understand.

3 THE COURT: All right. Let's take lunch and come back
4 in a half an hour.

5 (Recess)

6 (Continued on next page)

M1P3DOU4

1 AFTERNOON SESSION

2 2:00 p.m.

3 (In open court; jury not present)

4 THE COURT: Are we waiting for Ms. Rothman?

5 MR. ROOS: Before the jury or before the exhibits?

6 THE COURT: Before the exhibits.

7 MR. ROOS: We can go on for the expert without her.

8 THE COURT: Mr. Gottlieb, do you anticipate finishing
9 your cross this afternoon?

10 MR. GOTTLIEB: Not only this afternoon, but within
11 minutes.

12 THE COURT: Promises, promises.

13 MR. GOTTLIEB: You didn't hear me say promise. All I
14 said is within minutes.

15 MR. ROOS: 60 minutes, 90 minutes, 360 minutes.

16 MR. JANEY: That's the funniest thing Mr. Roos has
17 said.

18 THE COURT: Mr. Janey, you want to identify what, if
19 any, exhibits that you are objecting to?

20 MR. JANEY: Yes, your Honor. If I can. Bearing in
21 mind your Honor's comments from prior to the lunch break. I'd
22 like to divide my comments into three buckets. First dealing
23 with the exhibits, then discussing where we are seeking the
24 testimony of the witness and/or the government to be limited.

25 First, with respect to the exhibits, and looking in

M1P3DOU4

1 particular at exhibits that are under the 903, Government
2 Exhibit 903 series. If I can first and I'll go through exhibit
3 by exhibit where we have an objection. And the objection is
4 not as to all exhibits, your Honor.

5 THE COURT: I just want to, before you do that. I
6 have a page 19 and it says it goes through 20 and I don't have
7 a page 20.

8 MR. BURNETT: We have another --

9 MR. JANEY: I have, my version is 19 of 19.

10 THE COURT: Okay.

11 MR. BURNETT: It goes through 20. We can get you
12 another copy.

13 THE COURT: I thought there were -- in your second
14 bullet point in your letter, you say that the slides in 903 at
15 pages 7 and then 12 through 20. That's what you say.

16 MR. JANEY: I apologize, your Honor. That's
17 incorrect.

18 THE COURT: Okay.

19 MR. JANEY: That's incorrect. It's through 19 because
20 they actually have -- there is an ECF number on it, on my
21 version.

22 So, one, with respect to these, your Honor, and we
23 have by the count of my tabs I have nine objections. But here
24 is a categorical comment, your Honor, and it relates to time
25 frame. And the time frame issue that I'll describe relates to

M1P3DOU4

1 each one of the nine exhibits that I'll comment on.

2 We have a stipulation between the parties as to the
3 e-mails that have been admitted in evidence in this case. As
4 to the time frame of 2012 through 2017 while Mr. Doud was
5 there. And if I'm misstating the stipulation, I'm sure the
6 government will correct me but I believe that's correct.

7 Here with these exhibits, most of the exhibits that
8 I'm going to comment on begin with a time frame of 2010. And
9 my comment with respect to that, with each one of these that
10 I'll describe is the same as I was describing prior to the
11 lunch break. The time frames prior to the beginning of the
12 indictment are not probative of, A, whether Mr. Doud
13 participated or joined a conspiracy, and/or whether the
14 conspiracy exists. I understand where we've had issues in this
15 case as to conduct outside or after Mr. Doud has left, but
16 isn't resonant with what's going on in these slides to the
17 extent they're beginning from the 2010 time frame.

18 So with respect to time frame, your Honor, you'll hear
19 my comment with respect to each one of the slides that I'm
20 identifying.

21 In particular, then, beginning with slide three, your
22 Honor, and there I believe that the header on the slide is
23 RDC's shipments of opioids increase by 125 percent between 2010
24 and 2015.

25 Your Honor, this slide should change. Number one, on

M1P3DOU4

1 the horizontal axis, what it is measuring is activity between
2 2010 and 2017. It's emphasizing the increase, really as I was
3 describing earlier, the arc of the increase is really in the
4 2014 to 2016 time period with some minor dips. But the time
5 frame outside of the course of the indictment is not probative.
6 And that slide should change.

7 THE COURT: And you say -- I forget what date we
8 started.

9 MR. JANEY: 2012 to the end of March of 2017.

10 THE COURT: What was the month of 2012?

11 MR. JANEY: To my recollection your decision was
12 January 1.

13 THE COURT: All right.

14 MR. JANEY: So that illustrates the point with respect
15 to time frame on slide four.

16 THE COURT: So you think the time frame should begin
17 January of 2012?

18 MR. JANEY: Yes, your Honor. I don't believe that the
19 time frame earlier than that is probative of what's going on in
20 this trial.

21 THE COURT: Okay. And you believe that it prejudices
22 your client how?

23 MR. JANEY: It's not relevant. It is not relevant
24 evidence.

25 THE COURT: So --

M1P3DOU4

1 MR. JANEY: There is no -- it implies, the chart
2 implies there was something going on in 2010 and 2011, when
3 none of that is alleged in the indictment in this case.

4 THE COURT: Well, doesn't it imply just the opposite?
5 That nothing was going on. Very little was going on and that
6 it didn't start peaking until 2012.

7 MR. JANEY: No, because what happens, your Honor, is
8 that if I take, if I draw your Honor's attention to slide three
9 as an example. I think that a reasonable juror with the notion
10 that's under the arc that's written 125 percent increase from
11 2010 to 2015, on slide three, the 2010 time frame is used as a
12 part of the constant average growth rate to demonstrate that
13 beginning in 2010, that there is a substantial opioid increase
14 through 2015. It implies that that time frame is at issue in
15 this trial and it decidedly is not.

16 THE COURT: So, going to your next slide. Same thing?

17 MR. JANEY: On slide four, the same issue. And here,
18 your Honor, it is not as egregious as, well, number one to make
19 the record clear. Similar to slide three, the notations
20 indicated under each one of the lines implies, and a reasonable
21 juror could infer, that there was illicit activity that was
22 going on in the earlier time frame, and none that is charged in
23 the indictment in this case.

24 THE COURT: Why would they infer that from this chart?

25 MR. JANEY: Because the chart again, your Honor, it is

M1P3DOU4

1 measuring, even though on the horizontal axis it goes from 2010
2 to 2017, the notation under the arc describes a growth of
3 125 percent increase from 2010 to 2015. It infers and implies
4 that the opioid -- or the oxycodone distribution problem that's
5 at issue is as a part of the evidence in this case. And just
6 to drill down further, to pull the thread, that type of
7 constant average growth rate for periods outside of the
8 indictment should not be a part of the testimony of a witness.

9 THE COURT: Okay. Go ahead. Let's move along.

10 MR. JANEY: With respect to slide six, your Honor.

11 THE COURT: You're skipping slide five?

12 MR. JANEY: Yes, your Honor.

13 THE COURT: You have no objection to five?

14 MR. JANEY: No. Only as to time frame categorical
15 through all the slides and in the Exhibit 903 series.

16 THE COURT: Slide five also starts in 2010.

17 MR. JANEY: Yes. I started with my categorical issue
18 about time frame and now I'm trying to be specific with respect
19 to particular slides.

20 THE COURT: Okay. Go ahead.

21 MR. JANEY: With respect to slide six, your Honor, the
22 header the fentanyl sales were the key driver of the increase
23 in opioid sales dollars over the period. I guess, that's tied
24 into the time frame, so my objection there would also be about
25 time frame but it would change the header. And at best, what

M1P3DOU4

1 the witness could testify about is the growth of fentanyl sales
2 during a time frame which we submit would be 2012 to 2017.

3 THE COURT: So this is a chart that I guess all of
4 your fentanyl. So your objection is to the time and again in
5 2010?

6 MR. JANEY: If I can just sort of condense some of my
7 comments to make them brief while we have this slide. I would
8 argue with respect to this, your Honor, the limitation that we
9 would propose with respect to both the witness and the
10 government is that neither the government nor the witness can
11 use this slide to argue, or even to elicit testimony about the
12 weight of the fentanyl.

13 THE COURT: What, you mean the percentage?

14 MR. JANEY: Well --

15 THE COURT: When you say weight.

16 MR. JANEY: The weight. The amount of fentanyl that
17 was illicitly sold.

18 THE COURT: Isn't that part of the indictment?

19 MR. JANEY: Well, sure. But there is nothing about
20 this slide and there is no evidence that has been admitted,
21 there is no material that's been in evidence in this case that
22 goes to the weight of the fentanyl. That has not been
23 established.

24 THE COURT: What do you mean it has not been
25 established?

M1P3DOU4

1 MR. JANEY: The government hasn't proven the weight of
2 the fentanyl.

3 THE COURT: Obviously I am assuming that, I don't
4 remember if that's the case. If that's the case, then --

5 MR. JANEY: I haven't heard it.

6 THE COURT: Before they rest they will they need to
7 put in some evidence that there is over 400 grams of fentanyl.

8 MR. JANEY: I haven't heard it. But I don't believe
9 it can be derived from this slide.

10 THE COURT: All right. Well, okay. To the extent
11 that the record in this case reflects that, they can put it in
12 the chart.

13 MR. JANEY: I understand. But what I'm arguing is
14 that the record does not reflect that.

15 THE COURT: Okay.

16 MR. JANEY: All right. With respect to slide seven,
17 your Honor, I think I might have skipped over it. On slide
18 seven, the label is RDC's opioid shipments increase while
19 industry sales fell.

20 Now, here, your Honor, I don't believe changing the
21 header here is the issue. Number one, it's not probative of
22 what the sales were in the rest of the industry on these opioid
23 sales. It hasn't been a part of this trial.

24 THE COURT: Say it again?

25 MR. JANEY: It's not probative of the charged conduct

M1P3DOU4

1 as to what was going on with respect to the rest of the
2 industry in respect of opioid shipments.

3 THE COURT: You know, I can't agree with that. If
4 everybody else's sales are going down, and RDC's sales are
5 going up --

6 MR. JANEY: That doesn't tend to prove a conspiracy.
7 Just because there were sales going up.

8 THE COURT: It tends to prove an element of the
9 conspiracy, that the agreement was to increase the sale of
10 controlled substances and profit from them.

11 MR. JANEY: But for that, your Honor, you don't need
12 to do a comparison to the rest of the industry, for instance.
13 You would simply have a chart that would establish what your
14 Honor just described, which is during the relevant time frame,
15 and they already have that chart. And we haven't objected to
16 it, which is the opioid sales increased. That's not in
17 dispute.

18 THE COURT: No. But increased compared to what?

19 MR. JANEY: Increased from the prior period from year
20 to year.

21 THE COURT: But it's less relevant if opioid, if
22 opioid sales increased 222 percent for RDC, and for the
23 industry as a whole, it increased 500 percent, that would mean
24 something different.

25 MR. JANEY: But it doesn't -- I don't think --

M1P3DOU4

1 THE COURT: To say that it went down 18 percent in the
2 industry, and went up 222 percent with regard to RDC, makes one
3 question what was the legitimate reason that RDC is outside of
4 that trend.

5 MR. JANEY: Let me just say this, your Honor, because
6 I know time is short and I don't want get bogged down on this.
7 So that your Honor understands my objection. In order to
8 show -- this case is about diversion at the end of the day.
9 You don't need to do an industry comparison in order to show
10 diversion activity. You need to first, as your Honor just
11 described, show, for example, the sales of the opioids or the
12 narcotics increased. One. Two, that the red flags were
13 ignored and there was no investigation. Three, the evidence of
14 the diversion which the government has put on in this case is
15 that pharmacies, illicit pharmacies did things with those pills
16 they shouldn't have done. Again, I hear what your Honor is
17 saying --

18 THE COURT: But if the evidence was that opioid sales
19 for RDC were going down while opioid sales for the industry
20 were going up, you would be the first one in here arguing that
21 that's evidence that there wasn't a conspiracy.

22 MR. JANEY: I don't know, your Honor. My brain is
23 small, I think slowly, so I'd have to think about that.

24 THE COURT: You guys are an army of smart lawyers
25 there. Somebody would come up with that argument. It's not

M1P3DOU4

1 logical to say that my guy is profiting off of opioid sales
2 illicitly, when my guy's making less money in opioid sales than
3 the whole industry.

4 MR. JANEY: I hear your Honor. I am going to move on.

5 THE COURT: I don't disagree with you with regard to
6 the header. I think that the header doesn't really reflect
7 what the chart says.

8 MR. JANEY: Yes.

9 THE COURT: The header is not talking about, the chart
10 is not talking about increase.

11 MR. JANEY: That's right.

12 THE COURT: Or decrease in that comparison. It seems
13 to me a more appropriate header for this chart is RDC's opiate
14 shipments compared to industry sales.

15 MR. JANEY: Yes.

16 THE COURT: That's what they compare. Maybe the
17 expert or the lawyers can argue about how that reflected. But,
18 the header is not an argument. The header is supposed to be a
19 description of what the chart is supposed to represent. And
20 this chart represents the opioid -- RDC opioid sales compared
21 to industry sales, and when you look at that comparison, and
22 you make whatever conclusions and an expert or lay person is
23 supposed to make.

24 MR. JANEY: Right.

25 THE COURT: That's my reaction.

M1P3DOU4

1 MR. JANEY: Yes. With respect to slide 10, this was
2 the subject of --

3 THE COURT: You skipped slide eight.

4 MR. JANEY: Yes, your Honor.

5 THE COURT: You still have the --

6 MR. JANEY: We still have the categorical comment with
7 respect to all the slides relating to time frame where that's
8 applicable.

9 THE COURT: And you have another objection?

10 MR. JANEY: No.

11 THE COURT: And what about nine?

12 MR. JANEY: No, your Honor, except, let me put my
13 glasses on. Nine, again the categorical objection with respect
14 to time frame.

15 THE COURT: Right.

16 MR. JANEY: The other thing that I'll say on the face
17 of it, your Honor, well, I think -- just with respect to time
18 frame, your Honor.

19 THE COURT: You don't have any problems with the
20 heading?

21 MR. JANEY: See, I was just looking at that and I
22 didn't, on balance -- see, the header has to change in order to
23 match the change in the dates.

24 THE COURT: If that changes.

25 MR. JANEY: Right. Then in all fairness, if the top

M1P3DOU4

1 line is demonstrating that it's moving at a faster rate, I
2 don't believe we have an objection to that and I think that the
3 competent evidence shows that.

4 THE COURT: Okay.

5 MR. JANEY: With respect to 10, I believe that the
6 Court understands our objections there. That's the subject of
7 the colloquy prior to lunch.

8 With respect to slide 11, your Honor --

9 THE COURT: You don't think that in fairness, that
10 there should be any time period prior to the first date of the
11 conspiracy that's in this chart?

12 MR. JANEY: Well, so, I have certainly understood that
13 some experts may say, your Honor, and it's even true for me in
14 my former life at the Federal Reserve, that I would want some
15 pegging period.

16 THE COURT: The before and after.

17 MR. JANEY: Earlier in order to anchor it.

18 THE COURT: What do you think is reasonable?

19 MR. JANEY: But, I can conceive of a one-year prior to
20 going back, in order to anchor it, and I understand from an
21 economist standpoint where that may make sense. But I think on
22 balance, years prior to that, the prejudice, for the reasons
23 that I've already explained, outweigh the probative value. And
24 in fact, I believe there is no probative value --

25 THE COURT: Again I still, that's why I keep asking

M1P3DOU4

1 you, I still don't think you've articulated the prejudice.

2 MR. JANEY: The prejudice, your Honor, is that the
3 charts as constructed, particularly when they imply that there
4 was illicit activity and they explicitly imply it --

5 THE COURT: There is illicit activity prior to 2012.

6 MR. JANEY: Yes, your Honor.

7 THE COURT: I don't see any evidence in this case
8 that --

9 MR. JANEY: There is no evidence in this case.

10 THE COURT: I don't hear anybody argue that.

11 MR. JANEY: But the chart, again, your Honor, other
12 charts under the arcs of the lines describe, for example, and
13 several of them do this, a constant average growth rate of
14 125 percent and so on between 2010 and 2015. That's
15 prejudicial. It strongly gives the jury a false impression
16 that there was illicit activity in the earlier time frame years
17 outside of the time frame of this indictment. There is no
18 evidence of that in this case.

19 THE COURT: Well, you are going to end up with a
20 smaller -- a similar high percentage over a smaller period of
21 time.

22 MR. JANEY: Your Honor, this is the same question that
23 you asked me. I'm fine with that.

24 THE COURT: All right. Go ahead.

25 MR. JANEY: With respect to page 11, your Honor, the

M1P3DOU4

1 header is a problem. Again, customers -- it gives a
2 conclusion. Customers with exponential growth in opioid orders
3 would not be flagged by RDC's order of interest policy. I have
4 no idea how this data actually supports that header.

5 MR. BURNETT: Just so we are following along, that's
6 not what I have as slide 11.

7 THE COURT: I have that slide 12.

8 MR. JANEY: Okay. There was, we received an update of
9 the government's slide so I have this as --

10 THE COURT: Was that handed to me, the government's
11 update?

12 MR. BURNETT: I sent an update yesterday. Slide 11 on
13 that is about the bonus payments that are attributable to the
14 sales.

15 MR. JANEY: Whatever the slide number is. If it's 12
16 for the record. I'm referring to --

17 THE COURT: You say this is more accurately described
18 as what?

19 MR. JANEY: All it's measuring, just reading at the
20 horizontal axis, this is actual shipments, it seems to be
21 measuring actual shipments and RDC threshold. That's what the
22 box on the slide says it is measuring. The header makes a very
23 strong statement. It's not describing what's going on in the
24 chart. It's giving a value judgment. Customers with
25 exponential growth in opioid orders would not be flagged by

M1P3DOU4

1 RDC's order of interest policy. This witness is supposedly not
2 a compliance person, isn't going to opine at any level about
3 how or why orders were flagged, so forth and so on. He is not
4 competent to reach that conclusion that's embedded in that
5 header.

6 THE COURT: I'm not quite sure I totally understand
7 without the testimony what the chart is supposed to represent.
8 It represents the growth in dosages of opioids that was ordered
9 over this time period.

10 MR. JANEY: As I interpret it, your Honor, the blue
11 bars are actual shipments of opioid orders during the time
12 frame.

13 THE COURT: Right. That's how much opioids they
14 shipped during in those months.

15 MR. JANEY: It is labeled actual shipments, but the
16 gray line that --

17 THE COURT: The which line?

18 MR. JANEY: The gray line that moves, if you can see
19 right above the bars beginning in January of 2014.

20 MR. ROOS: I think AUSA Burnett who is putting on this
21 witness can explain what the witness will say.

22 MR. BURNETT: Yes.

23 MR. JANEY: If I can just finish what I was saying.
24 Thank you. The gray line appears to measure what that growth
25 is. So that's a growth curve. Right.

M1P3DOU4

1 MR. BURNETT: I don't think that's right.

2 THE COURT: I don't think that is right. I was a
3 little confused by this too. The end of the gray line, after
4 October '16 compared to what happened in January of '14 that
5 there was an increase, well, I guess from January '13, there
6 was an increase in opioid orders of 1800 percent.

7 MR. BURNETT: I can explain. I think we are going --
8 what this shows is basically RDC's order of interest system,
9 the way it created set thresholds for the orders that customers
10 were allowed to place was by looking at a 12-month rolling
11 average and taking a one and a half times multiple of that.

12 So when the chart here on page 12, and the following
13 chart on page 13, what those are, are basically what the expert
14 did is he said, okay, let me take that system, the way the
15 system operates, and plot out how with a hypothetical customer
16 who had either an unusual spike in ordering, which is what you
17 see on page 13, or that had pretty substantial exponential
18 growth in their purchasing. Would that customer have been
19 flagged for an order of interest under the way the system was
20 designed. And the answer is no.

21 So the gray line reflects what the order limit is
22 under the way RDC calculated its thresholds, and the blue lines
23 reflect the hypothetical ordering of the customers.

24 THE COURT: I don't know how that reflects a
25 conspiracy.

M1P3DOU4

1 MR. BURNETT: What it does, it shows the question that
2 the expert is trying to look at here is under RDC's system, the
3 way they designed it, would it have caught significant
4 increases or significant spikes in the ordering of controlled
5 substances at pharmacies, which is one of the factors that a
6 distributor is supposed to detect.

7 THE COURT: If the answer is no, it would not have
8 been obvious to people at RDC or Mr. Doud, what is that
9 evidence of?

10 MR. BURNETT: I think what it shows is, the main thing
11 it shows when the system actually was getting tripped, which is
12 the next piece of the stuff in the slides, then we're talking
13 really substantial growth and really substantial spikes for
14 that system to be triggered.

15 THE COURT: The blue lines indicate how many doses
16 were ordered?

17 MR. BURNETT: For a hypothetical customer.

18 THE COURT: When you say a hypothetical customer --

19 MR. BURNETT: The two slides, 12 and 13.

20 THE COURT: Why are you dealing with hypothetical
21 customers?

22 MR. BURNETT: Just to illustrate how the threshold
23 setting system worked.

24 THE COURT: I don't understand what this is supposed
25 to be saying to a jury.

M1P3DOU4

1 MR. BURNETT: What is this saying to jury is the
2 threshold system that RDC designed would only trigger when
3 there are very substantial increases, or very substantial
4 spikes, in the ordering from a customer. What that does is it
5 helps the jury to have context to understand what was happening
6 when a spike actually did trigger the order of interest system,
7 which is what the rest of the slides talk about.

8 MR. JANEY: If that's in fact what these two slides
9 are, then our objection is both of these slides should be
10 precluded.

11 THE COURT: What does the second slide show?

12 MR. BURNETT: The second slide is another one of these
13 hypothetical examples using the way their system worked, but to
14 show a spike as opposed to a growth.

15 THE COURT: I'm not sure why we're dealing with, given
16 the amount of sales that you demonstrated and you want to
17 demonstrate in this chart, why are we dealing with hypothetical
18 sales.

19 MR. BURNETT: These two slides are designed to
20 illustrate how the system worked before it actually tripped.

21 If you think it's too confusing, we are happy to cut
22 the slides.

23 THE COURT: I definitely think it's too confusing but
24 that's not my issue. Your job is to confuse them, if that's
25 what you want to do. I just don't understand, this isn't based

M1P3DOU4

1 on any evidence that was offered, evidence of sales that were
2 offered in this case, it is based on a hypothetical.

3 MR. BURNETT: It's based on Government Exhibit 276,
4 which lays out the formula that the order of interest system
5 used.

6 THE COURT: But the formula changed several times,
7 didn't it?

8 MR. BURNETT: This is the most conservative version of
9 the formula.

10 MR. JANEY: That makes it very confusing and
11 potentially misleading. We have a lot of actual evidence and
12 actual conduct that the government has alleged. If you are
13 putting on a hypothetical scenario --

14 THE COURT: I think they may be right on these two
15 slides. If you cannot glean this kind of evidence and argument
16 from the actual sales that took place at the company, then I am
17 not sure in fairness that a hypothetical is what's appropriate.

18 MR. BURNETT: They are not really central to the
19 testimony. I'm happy not to cover these slides.

20 THE COURT: I must tell you I did not get that point
21 when I read those two slides. I was totally confused.

22 MR. BURNETT: Slides don't really speak for
23 themselves. You need the expert.

24 MR. JANEY: Now understanding some of the scope and
25 nature of the witness's testimony, while we're on this, we

M1P3DOU4

1 would seek that the witness be limited from giving hypothetical
2 explanations of the evidence and that the government be
3 restricted from eliciting from the witness hypothetical
4 scenarios to present actual evidence to this jury.

5 THE COURT: Well, I'm not quite sure what
6 hypothetical.

7 MR. JANEY: Based on what the government has just
8 described, it's certainly more than mere speculation at this
9 point.

10 THE COURT: Does the government intend to propose
11 hypotheticals to this expert?

12 MR. BURNETT: No. To be clear, that's just how the
13 system works. There are no other hypotheticals we are
14 proposing.

15 THE COURT: Let's move on.

16 MR. JANEY: With respect to 13 and 14, your Honor, our
17 comments are consistent with the categorical objection as to
18 time frame.

19 THE COURT: Okay.

20 MR. JANEY: With respect to the headers, it's not
21 entirely clear to me that the headers are actually describing
22 the activity that's going on in the charts. RDC orders of
23 interest identified for all controlled sales during the time
24 period. I'm not sure I understand that given what's on the
25 horizontal axis and described below. It says --

M1P3DOU4

1 THE COURT: Let's start with that first box. What
2 does 89 percent mean?

3 MR. BURNETT: May I explain?

4 THE COURT: Yes.

5 MR. BURNETT: You are looking at the one that's titled
6 order of interest identified for all controlled substances.

7 THE COURT: Yes.

8 MR. BURNETT: Each bar here reflects the total number
9 of order of interests, order of interest that RDC's system
10 flagged in each quarter.

11 THE COURT: So these are the actual statistics with
12 regard to the flagged orders of interest?

13 MR. BURNETT: Exactly, and the blue part of the bar,
14 that reflects the number -- that reflects the number of orders
15 that were flagged and then shipped. The orange part of the bar
16 reflects the number of orders that were flagged and then
17 partially shipped, because an order can have, say, 200 units in
18 it so 100 gets shipped, 100 doesn't. The gray part of the bar
19 reflects the number of orders that were flagged and then
20 actually denied. And the percentage of, on top of the bar,
21 reflects the number of orders or the percentage of orders that
22 were either completely released or partially released. So
23 let's say there were 100 orders of interest that were flagged
24 by the system in a particular quarter. RDC completely shipped
25 95 of them, and partially shipped another four of them. Then

M1P3DOU4

1 it would be 99 percent of the top of that bar.

2 THE COURT: Your numbers at the bottom, these are
3 quarters?

4 MR. BURNETT: Yes, each quarter.

5 THE COURT: Okay. So, in the last quarter of 2010,
6 there were 80 -- I don't see, it doesn't tell me how many
7 orders of interest there were.

8 MR. BURNETT: The Y axis tells you that. We didn't
9 specifically designate the number within the Y axis. So
10 basically, to take an example, say you look at like one that
11 kind of lines up well. So Q1 2015. So there are about looks
12 like about 1300 orders of interest that are --

13 THE COURT: 95 percent of those were shipped out.

14 MR. BURNETT: Were shipped or partially shipped.

15 THE COURT: All right. And then the second chart
16 after that is similar?

17 MR. BURNETT: It is the same exact thing, but narrowed
18 just to oxycodone and fentanyl.

19 THE COURT: What are your objections to those two?

20 MR. JANEY: The time frame, your Honor. It is the
21 categorical objection to time frame.

22 THE COURT: And then let's go on.

23 MR. JANEY: Right. I'm on what I have marked as page
24 15, the government may correct me if my pagination is wrong,
25 but it is labeled RDC shipped oxycodone and fentanyl orders

M1P3DOU4

1 even after they were flagged. There the comment is two-fold,
2 your Honor. It is one it's with respect to time frame. And
3 two, is the label. It is not just describing. The "even
4 after," right. It's unnecessary, it reaches a conclusion.
5 Again, the flagging, the process for the flagging, he is not
6 testifying as to that. He is only testifying as to the
7 numbers.

8 THE COURT: Is there any reason why it isn't accurate
9 to simply say RDC oxycodone and fentanyl orders shipped after
10 they were flagged?

11 MR. BURNETT: We can delete "even." I'm not losing
12 sleep over that.

13 THE COURT: Okay. And just put ship after orders. I
14 think it's clearer.

15 MR. BURNETT: Okay.

16 THE COURT: How difficult is it for you to adjust
17 these numbers if we change the time period?

18 MR. BURNETT: It's going to be a bit of work. I think
19 this time frame objection, I have an answer to it, but I'm
20 happy to give it when Mr. Janey is done. I think it is
21 unnecessary. I think the comparison is relevant and there is
22 certainly no unfair prejudice. It's also all in evidence, too.

23 THE COURT: Let's go through the next couple.

24 MR. JANEY: Right. What I have is page 16 of 19, but
25 it is labeled RDC orders of interest compared to suspicious

M1P3DOU4

1 orders reported to the DEA 2010 through 2016. There, to be
2 consistent, it is time period, but more importantly, your
3 Honor, if the version that I have is correct, it shows
4 suspicious order activity report to the DEA, it shows four.
5 Now first, let me confirm with the government that I'm looking
6 at the right version of the chart.

7 MR. BURNETT: So, I think -- it does say four. I
8 think you're missing a page somewhere along the line because
9 you are a page behind.

10 MR. JANEY: No, I skipped --

11 MR. BURNETT: This is 17 for me.

12 MR. JANEY: Okay. That's fine. This is the slide I'm
13 talking about. And in my comment there, your Honor, is I
14 believe it is inaccurate based on the evidence that has been
15 admitted.

16 THE COURT: What's inaccurate?

17 MR. JANEY: The four. We have elicited, by my count,
18 information of at least 12. We can go back and pull the
19 record. But the evidence before this jury is not four.

20 MR. BURNETT: That's wrong.

21 MR. JANEY: Look, we can break things down.

22 THE COURT: Why is there a discrepancy?

23 MR. BURNETT: I think what's happening here is there
24 was a period between the beginning of Jan. 1, 2017, and the end
25 of Q1 2017. I think there were eight or nine suspicious order

M1P3DOU4

1 reports that RDC filed during that period. Because Mr. Doud
2 had technically not officially retired by then, I think the
3 defense has been counting them as in the group that was filed
4 while Mr. Doud was running the company. The testimony that
5 came in from both Mr. Pietruszewski and from Jessica Pompeo was
6 that, for all practical purposes, Mr. Doud was out of the
7 compliance picture by the end of 2016. And so that's why we've
8 been looking at the period between 2016 and prior, and in that
9 period there is four.

10 THE COURT: So you say between 2010 and 2016 there
11 were four suspicious activity reports filed.

12 MR. BURNETT: That's factually accurate.

13 THE COURT: You say that there were 1,252 that had an
14 order of interest.

15 MR. BURNETT: There were 12,000 that were orders of
16 interest that the company shipped. There were 1,252 orders of
17 interest that the company either denied or partially denied,
18 and there were four orders --

19 MR. JANEY: On the DEA reports, your Honor, the
20 government can't have it both ways. They want to hold his
21 conduct, hold him responsible for conduct through March of
22 2017, but don't want to allow suspicious activity reports filed
23 with the DEA to be attributed to him for part of the time
24 frame.

25 THE COURT: I don't know what your position is with

M1P3DOU4

1 regard to that, as to whether or not Mr. Doud had anything to
2 do with those suspicious order activity reports.

3 MR. JANEY: Look, the government has taken the
4 position that regardless of what Jimmy or Bobby or Suzy were
5 saying to each other, the fact is that he was the management,
6 the upper management, and so whatever happened during the time
7 frame of the indictment, they are attributing that conduct to
8 him. So, they can't have it both ways. Those reports were
9 filed during --

10 THE COURT: You want to have it both ways, too. You
11 want to say that he has something to do -- you are not saying
12 he has anything to do with those reports.

13 MR. JANEY: I don't know why, I don't know why your
14 Honor is saying that.

15 THE COURT: Well, first of all, there is no evidence
16 in this record, and I'm not sure that you are arguing, that as
17 of that the period of time that they were talking about, that
18 he was involved at all with regard to suspicious activity
19 reports in 2017.

20 MR. JANEY: I don't think I have to get into the
21 minutia that the government --

22 THE COURT: You have gotten into the minutia. That's
23 all you have done is minutia. They want to do general
24 statistics and you want to do the minutia of going to the
25 individual report.

M1P3DOU4

1 MR. JANEY: So I won't waste time on this now. I'll
2 cross-examine him on it. The documents are admitted in
3 evidence.

4 THE COURT: That's what I was going to say. Why isn't
5 this appropriate for cross-examination?

6 MR. JANEY: That's fine.

7 THE COURT: I want to be fair about it.

8 MR. JANEY: That's fine.

9 THE COURT: I don't hear you saying that the record
10 supports an argument that you can make that Mr. Doud was
11 involved in any of these decisions for most of 2017.

12 MR. JANEY: Your Honor --

13 THE COURT: The opposite, the evidence is just the
14 opposite.

15 MR. JANEY: I'll deal with it on cross.

16 THE COURT: Okay. And then what about the next one?

17 MR. JANEY: Again, everything else, I'm now going to
18 move to Exhibit 905.

19 THE COURT: Oh.

20 MR. JANEY: I'm good.

21 THE COURT: Because --

22 MR. JANEY: The time frame comment applies to all, but
23 you've heard me on that.

24 THE COURT: Where are you going now?

25 MR. JANEY: 905, your Honor.

M1P3DOU4

1 THE COURT: Okay. All right.

2 MR. JANEY: Here, this goes not so much to the slides
3 themselves, your Honor. Here my comment goes to, from the
4 defense perspective, the limitation that should be either on
5 testimony or argument. And it's our position these charts
6 describe consistently and throughout total sales dollars and
7 then controlled substance sales dollars.

8 And my comment here would be that neither the witness,
9 who I've been told repeatedly now will not testify about
10 diversion, but also that the government cannot argue that the
11 controlled substance sales dollars, those particular dollars,
12 so, for example, if I use the example of Alden Pharmacy, Inc.,
13 which is right after the summary slide with \$330,980 of
14 controlled substance sales, that those sales dollars in and of
15 themselves represent diversion. There's been --

16 THE COURT: It doesn't say it represents diversion.
17 Somebody going to testify that they represent diversion?

18 MR. JANEY: I don't know. Earlier before lunch you
19 asked me to my understanding, your Honor, where the defense
20 would want limitations on the exhibits. The physical
21 documents.

22 THE COURT: How would you want me to limit this?

23 MR. JANEY: That this exhibit cannot be used as a
24 basis for the government to argue that these controlled
25 substances sales dollars are evidence of diversion.

M1P3DOU4

1 THE COURT: Well, the question is not just whether
2 it's evidence of diversion. It is also whether or not they, as
3 you seem to want to dispute, that they significantly
4 contributed to Mr. Doud's income.

5 MR. JANEY: Well, what -- yes. But I am expecting or
6 anticipating that the other slide will be used as a predicate
7 for that.

8 THE COURT: Which slide?

9 MR. JANEY: The slide that we started earlier in the
10 903 series which is only about the compensation numbers. It
11 does not include controlled sales dollars on it.

12 THE COURT: I know, but 904 is a general exhibit, the
13 top page. 904 is a general exhibit summary of red flags.

14 MR. JANEY: Yes.

15 THE COURT: Okay. Now, I assume, where is my note. I
16 assume that, I mean, I'm trying to figure out what we're
17 dealing with. There is red flags that were identified by RDC.

18 MR. JANEY: Yes.

19 THE COURT: There were red flags that apparently are
20 going to be identified by the expert that wasn't identified as
21 red flags.

22 MR. JANEY: My expectation is the opposite. I'll be
23 jumping up and down if this expert starts identifying red flags
24 that have not been part of this case.

25 THE COURT: So, the summary of red flags identified in

M1P3DOU4

1 41 customer case studies is red flags that RDC identified.

2 Right?

3 MR. JANEY: I will cross-examine on that, your Honor.

4 THE COURT: But that's the evidence the government
5 intends to --

6 MR. JANEY: That's the evidence that the government
7 intends to promote to the jury.

8 THE COURT: And the red flag definition that they're
9 using is the criteria that RDC used to identify red flags.

10 MR. JANEY: I have questions about that, to be sure,
11 but I will clarify that on cross-examination. I want to be
12 clear about that.

13 THE COURT: That's my understanding. Now if they say
14 they have something on this list that their expert said, well,
15 in my opinion it is a red flag and nobody else at RDC thought
16 it was a red flag, then we can discuss that. But that's not, I
17 didn't think we were going outside the realm --

18 MR. JANEY: I need to hear the testimony before I can
19 make that objection.

20 THE COURT: So the summary chart, the summary of red
21 flags identified is an accurate chart?

22 MR. JANEY: To my understanding, as I stand here today
23 without hearing the witness testimony, that's what I expect.

24 THE COURT: And the underlying individual charts with
25 regard to individual pharmacies, that information is accurate?

M1P3DOU4

1 MR. JANEY: Yes.

2 THE COURT: But you say it's unfair to do what?

3 MR. JANEY: What I am saying, your Honor, is to the
4 extent that the government plans to argue that the controlled
5 substance sales dollars in those boxes are evidence of
6 diversion activity, we have an objection, because that's not
7 true. That is not the evidence that's been admitted in this
8 case.

9 THE COURT: All right.

10 MR. JANEY: The only thing it shows --

11 THE COURT: I'm not to that point yet.

12 MR. JANEY: I'm sorry.

13 THE COURT: That's an argument point. The question is
14 whether or not I should exclude the chart that reflects this,
15 or I should exclude the testimony of the expert in some way
16 with regard to this chart. Now, if they think they have a
17 basis or if they don't have a basis to argue what you've just
18 said in their summation, then my standard practice is to remind
19 the jury that what the lawyers say is not evidence, that it's
20 their recollection of the testimony that controls.

21 MR. JANEY: And the only thing that this witness can
22 argue with respect to using this example, Alden Pharmacy, is
23 that's the number of controlled substances that it purchased
24 from RDC. Where it potentially becomes misleading, your Honor,
25 and I want to be clear, as to where my angst is about this

M1P3DOU4

1 chart, is one could look at this because it's on a table of red
2 flags, and this goes to where earlier I said you can have
3 factual data but it's misleading or confusing even though it's
4 true in fact. The jury may infer, a reasonable juror could
5 infer from the fact that it's on a chart and part of a context
6 of red flag analysis that that \$330,000 is inherently part of
7 the illicit activity and there is no evidence of that.

8 THE COURT: What makes you say this is a part of the
9 red flag analysis?

10 MR. JANEY: Because, this summary chart going back to
11 the summary chart is not --

12 THE COURT: Those are two different charts. There is
13 904 and 905.

14 MR. JANEY: To my understanding, subject to the
15 government saying otherwise, I understand these individual
16 charts like Alden Pharmacy and the others that follow
17 thereafter, Brighton Eggert Pharmacy, etc., to be part of the
18 41 customer case study analysis put on by the expert.

19 THE COURT: It is only a red flag if it is one of
20 these things on the front on Exhibit 904.

21 MR. JANEY: If that's true, your Honor, that's further
22 to the point why that shouldn't be there.

23 THE COURT: What shouldn't be there?

24 MR. JANEY: The controlled substances sales dollars
25 for that customer.

M1P3DOU4

1 THE COURT: No. But that's not on that chart. That's
2 not on 904.

3 MR. JANEY: But it's on 905.

4 THE COURT: Those are two different exhibits.

5 MR. JANEY: They are part of the same set. He is
6 going to talk --

7 THE COURT: I don't know if that's determinative. It
8 is part of the same set.

9 MR. JANEY: The government is here, so what I
10 anticipate -- what I anticipate is slide 904 is going to go up
11 on the screen.

12 THE COURT: They are going to say these are the red
13 flags.

14 MR. JANEY: It will set the stage for him to talk
15 about the customers that underlie the numbers in the right-hand
16 column box.

17 THE COURT: Okay. So what part of those numbers is
18 inadmissible?

19 MR. JANEY: Well, where I think it's misleading and
20 prejudicial, again, is the controlled substance sales dollars.

21 THE COURT: The controlled substance -- but that's,
22 those are accurate numbers, aren't they?

23 MR. JANEY: They are accurate numbers, your Honor, but
24 again, viewing Exhibit 905, it's misleading because it tends to
25 suggest that all of the controlled substances buys by Alden

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1 Pharmacy are illicit. And that is not true.

2 THE COURT: No, it doesn't say that.

3 MR. JANEY: It doesn't say.

4 THE COURT: It doesn't say that at all.

5 MR. JANEY: A reasonable juror could infer that where
6 the expert is giving description about red flag activity in the
7 context of his 41 case studies.

8 THE COURT: Not if you make it clear on
9 cross-examination that that's not what the expert is saying,
10 and you represent to the jury at the time of summation that
11 there is no such evidence that every one of these dollars is an
12 illicit dollar.

13 MR. JANEY: I can certainly do it on cross, your
14 Honor.

15 THE COURT: It doesn't say anything about illicit
16 dollars, it doesn't say anything one way or the other about
17 whether these are illicit or proper sales.

18 MR. JANEY: Well --

19 THE COURT: It just says they -- the two things that
20 are important on these charts with regard to that. One, that
21 there is a significant amount of money being made off of
22 controlled substance sales. And two, that there were a certain
23 percentage of these controlled substance sales that were beyond
24 the 30 percent threshold, which to the extent that that's
25 related to red flags, which should have obviously made someone

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1 say, okay, we have a red flag here, what are we going to do
2 about it.

3 MR. JANEY: The only thing that we are seeking is by
4 limitation on the testimony and on the government's argument
5 that in no way that it be suggested that that total dollar
6 amount attributed to controlled substance dollars in and of
7 itself represents illicit activity.

8 THE COURT: Does the government think they are in a
9 position to make that argument?

10 MR. BURNETT: We are not going to say every dollar
11 that -- he's just going to say this is the amount of money they
12 bought in controlled substances. And then he is going to move
13 on.

14 THE COURT: Okay. Well, I am just trying to figure
15 out whether you think you are going to make the argument that's
16 going to draw an objection from Mr. Janey.

17 MR. BURNETT: We'll be arguing in closing that there
18 is money to be made in opioids. We are not going to say X
19 dollars from that pharmacy or Y dollars.

20 THE COURT: Neither you nor your expert is going to
21 say that the number in this box represents the dollars that
22 were made off of solely illicit sales?

23 (Continued on next page)
24
25

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1 MR. BURNETT: He's not going to get into that topic.

2 MR. JANEY: That's that not the question. The
3 question is whether the expert will testify as to that, A; B,
4 Whether the government will seek to elicit that testimony; C,
5 Whether the government will make that argument based on that
6 type of chart.

7 MR. BURNETT: The dollars don't matter for that sort
8 of thing, and the expert is not going to talk about that.

9 THE COURT: You're avoiding the answer. Is that his
10 intention.

11 MR. BURNETT: The one thing I'm trying to be aware of
12 for the closing situation, and I don't want to pennants in on
13 closing, is it's the obligation of the distributor to maintain
14 effective controls against diversion. And I think there is a
15 good argument that we haven't actually hashed out internally,
16 but if you're not maintaining effective control against
17 diversion with respect to a particular pharmacy, then the drugs
18 you're selling to that pharmacy are going there illegally.

19 MR. JANEY: That's the problem.

20 THE COURT: There's a strong likelihood that at least
21 some of those drugs are going out illicitly. You don't have any
22 evidence in this case every single drug that was --

23 MR. BURNETT: We're not trying to attribute certain
24 dollars to certain --

25 MR. JANEY: Again, so that I'm clear so that your

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1 Honor understands what I'm asking --

2 THE COURT: I'll answer the question for you. They're
3 not going to make that argument.

4 MR. JANEY: Thank you, your Honor.

5 THE COURT: I'm not going allow them to make that
6 argument, unless they can point to someplace in this record
7 that gives them a basis to say that they've proven that every
8 single dollar that was made off of an opioid was an illicit
9 sale. The jury's not stupid. They know that.

10 Let's get the jury. Let's move forward. We'll talk
11 about it one more time. I don't think I'm going to limit them
12 with regard to the time period. I think we're only talking
13 about one year. I think it's in fairness.

14 MR. JANEY: We're talking about --

15 MR. ROOS: The jury's entering.

16 THE COURT: We'll talk about it again.

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(In open court; jury present)

THE COURT: Please be seated, ladies and gentlemen.

We've been a little choppy in the beginning, but I'm hopeful it will save us time in the long run.

Mr. Gotlieb.

MR. GOTTLIEB: Thank you, your Honor.

BY MR. GOTTLIEB:

Q. Mr. Pietruszewski, good afternoon.

A. Good afternoon.

Q. With regard to when we broke, we were talking about the time period when there were the emails that the jury has seen already about changing the standard operating procedures for compliance. Do you remember that?

A. Yes.

Q. And you recall seeing the emails from one or more sales people who had complained about the delay, the slowness in completing the compliance, I believe it was from Steve Bahani. Do you remember that?

A. Yes, sir.

Q. And do you recall that as a result of -- in following those emails, word went out and Mr. Doud had indicated that he wanted to change the policy. Do you recall that?

A. Yes, sir.

Q. And following Mr. Doud saying that, initially a number of the people in compliance initially said that they were okay

M1PBDOU5

1 with that change initially, correct?

2 A. We did what we were told to do, sir.

3 Q. I understand. Initially it was relayed and said to

4 Mr. Doud that they were okay with it, correct?

5 A. Again, we were following management's decisions.

6 Q. And in following what you determined was management's
7 decision, it was verbalized in emails that it was okay with
8 compliance to change the policy, correct?

9 A. Yes.

10 Q. And after that was relayed to Mr. Doud, you would agree
11 then there was some pushback among people in compliance,
12 including yourself, correct?

13 A. Yes.

14 Q. And you were one of those who actually said, if there is
15 going to be a change, it should be passed by the attorneys. In
16 this case, Don Bilgore, correct?

17 A. Yes.

18 Q. And any new policy should be passed by the attorneys and
19 any policy should then be put in written form, correct?

20 A. Yes.

21 Q. So that you had it in hand to show it to the DEA if
22 requested, correct?

23 A. Yes.

24 MR. GOTTLIEB: Then we were up to Defense Exhibit A80,
25 which your Honor I believe we had moved to have that received

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1 in evidence. I know there was some discussion, but I believe
2 that to be received in evidence?

3 THE COURT: Yes, I'll admit it into evidence.

4 MR. GOTTLIEB: If we can put that on the board and
5 publish to the jury.

6 Q. Mr. Pietruszewski, A80 is before you and the jury. Is it
7 fair to say that before Don Bilgore, the attorney or any of the
8 attorneys put together another written policy, Larry Doud sent
9 out this email on June 14, 2016, to the sales people and to the
10 compliance people, correct?

11 MS. ROTHMAN: Objection, assumes facts not in
12 evidence.

13 THE COURT: Overruled. You can answer if you know.
14 A. Yes.

15 Q. If we can look at the first paragraph, please.

16 Larry Doud writes: Fellows maids and marion. With
17 regards to opening new accounts, as we discussed there will be
18 a slight change in how we go. I think it will result in
19 opening stores faster when the credit app is approved. We will
20 require the dispensing report with the credit app and also
21 required pictures that you have taken. So when everything is
22 here and the credit manager responsible blesses the account and
23 the dispensing report is here, we will open the account for all
24 purchases.

25 The compliance department will do our due diligence.

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1 And if everything is good we will go forth. If there should be
2 a problem and Joe tells me, there are about 2 percent of the
3 time, we will stop shipping controls until we get the issues
4 resolved.

5 Continuing next paragraph, please.

6 In most cases, I think you know if there will be a
7 problem. You should mark the app for Jessica to see so that we
8 do not make obvious mistakes. But better yet, if you know
9 there will be issues, like that is why they want to do business
10 with us, you may not want to even do the application or warn
11 the account. It will take longer to open. We cannot be
12 careful enough about staying completely in bounds on these
13 issues.

14 I hope that the change will allow us to move more
15 quickly when you guys are successful at getting us some new
16 existing business from the competition.

17 Next paragraph, please.

18 The dividend looks like it will be 2.11 percent. The
19 numbers are done as far as I can tell and that is the
20 percentage. I think it is the second highest we've paid.
21 Obviously, the most dollars ever. Also profit-sharing checks
22 are scheduled to go out this Friday. The checks are live, so
23 you can say a prayer of thanks and ask for his continued favor
24 while you are at the bank. I looked at your numbers and they
25 are very good. Obviously the longer you have been here, the

M1PBDOU5

1 better the bonus. As always, we appreciate the incredible job
2 each and every one of you do. You are the best group I have
3 ever worked with. Thanks you all. And that's signed by Larry
4 Doud, correct?

5 A. Yes.

6 Q. If we can look at A18, your Honor.

7 Sir, this is an email thread involving you, Jessica
8 Pompeo, Elizabeth Cullen, Larry Doud regarding the DEA
9 conference in Indianapolis, correct?

10 A. Yes.

11 Q. Dated May 12, 2016, correct?

12 MS. ROTHMAN: We have no objection.

13 THE COURT: It will be admitted into evidence.

14 (Defendant's Exhibit A18 received in evidence)

15 MR. GOTTLIEB: May we publish it to the jury, please.

16 THE COURT: Yes.

17 Q. Beginning with the email on the bottom on the first page
18 beginning with good morning. This is from you Bill
19 Pietruszewski dated May 12, 2016 to Larry Doud, Joe Brennan and
20 a number of other people, and this is what you write:

21 I first would like to thank everyone for allowing
22 Jessica, Liz and I to attend the DEA conference in
23 Indianapolis. This was a great opportunity for us to learn
24 more knowledge from the DEA. I want to just quickly bring up a
25 request and suggestions below that we took away from the

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1 conference. The DEA is asking that all registrants have a
2 binder or folder ready for whenever DEA makes a visit to our
3 facilities. We do have this folder for both of our facilities,
4 but we have a few items we need to add.

5 I need to ask of the buying department can supply
6 compliance with a SOP for purchasing CII to CV. We currently
7 have receiving documents and how we check in the freight, but
8 they would like an SOP on how we determine when we decide to
9 make purchases of controlled substances, CS. Then they are
10 asking that both of our facilities include the CS packing slips
11 of CIII to CV with the receivers that are used to check in the
12 product in the cage. CII packing slip is not needed since we
13 have the DEA 222 forms in the vault.

14 The metro facility will institute this procedure today
15 and Jessica will be meeting with Tim Brown to start in
16 Rochester. Then the DEA is asking for more open communication
17 of registrants, us, to our local DEA office.

18 For example, we should give the local office a call
19 and see if they would meet with metro and discuss the letter of
20 admonition and let them know we understand.

21 Next page.

22 We do not need Carlos for this, and I have no problem
23 reaching out to the local office once the attorneys approve my
24 letter and I may send it to the DEA. We also learned that the
25 DEA is working closely with the DOJ and they are going after

M1PBDOU5

1 fraud that pharmacies may be having with medicaid or medicare.
2 I bring this up for on Tuesday RDC notified Done and Jim and
3 now the attorney also like to discuss.

4 This may have nothing to do with RDC. And if this is
5 not a subpoena, I am not sure we want to wait to speak with the
6 attorneys and delay the information to the DEA. I agree we can
7 notify Don, but we should still supply the information. We
8 need to keep an open communication with the DEA. I can discuss
9 more when it's convenient with everyone, but I wanted to at
10 least bring this up.

11 Then last I ask when the time allows that everyone to
12 go on the website below or Google FBI Chasing the Dragon. This
13 is a very powerful video. Please note, it is an uncut version.
14 There's a lot of swearing, but actual victims of opioid abuse
15 speak. The ladies and gentlemen and I feel we could have this
16 video for the next sales meeting if everybody is okay with
17 this. There's more we would like to share, but for now the few
18 items above are the most important. Thank you, Bill.

19 Now if we can go to the top part of the thread. This
20 is an email from Larry Doud in response, Thursday, May 12,
21 2016. Thanks, Bill. I did notice Jessica had quite a sunburn
22 this morning and I heard Liz still has some amusement park
23 stamp on her hand. What's up with that? I look forward to us
24 getting as compliant with the suggestions as we can, and I
25 think the meeting with the NJ folks on the letter is excellent.

M1PBDOU5

1 Please keep me posted on when we are moving ahead with this.

2 Thank you.

3 MR. GOTTLIEB: And then A28, may we place that on the
4 screen, your Honor?

5 THE COURT: Yes.

6 MR. GOTTLIEB: I don't believe there's an objection to
7 that?

8 MS. ROTHMAN: No objection.

9 THE COURT: It will be admitted into evidence.

10 (Defendant's Exhibit A28 received in evidence)

11 MR. GOTTLIEB: May we publish to the jury?

12 THE COURT: Yes.

13 Q. Here it's an email from Bill Pietruszewski on the bottom,
14 January 9, 2013, to Larry Doud, Joe Brennan, Lanny Doud and you
15 write as follows: The volume that Linden Care would be sending
16 to us as I mentioned do worry me for the dollars they buy a
17 month, 78 percent are of narcotic control items.

18 As I mentioned last month, Linden Care purchased
19 50,000 units of oxycontin, brand generic from RDC. Now looking
20 at the numbers, Mark from Linden Care supplied this would
21 increase to 155,000 per month of the oxycontin over 1.8 million
22 a year. I just think of the problems that CVS had down in
23 Florida, and do want RDC to fall victim of such an occurrence.
24 What worries me is that they want this to happen quickly which
25 just put me on the defense even more. For all we know, HD

M1PBDOU5

1 Smith could be cutting them down on these items. With that
2 said, I contacted Buzzeo PDMA. If I can stop reading, what is
3 that if you know?

4 A. Buzzeo ex-DEA.

5 Q. Continuing. This is the group that had the conversation
6 Richie and I attended last year. I asked what we would need to
7 do if we wanted to hire them as a consultant group so we could
8 speak to an ex-DEA agent.

9 Ed Harris who is the salesman for the Buzzeo group
10 inform me, the first step would be that RDC would need to sign
11 a contract. Once I heard that I told him to forward the
12 information and that I would have to pass the information off
13 to my superiors to see how they would like to proceed.

14 And then he continues or you continue.

15 And you end, I apologize for the long email, but to
16 get my opinion out there now about this rather than after the
17 fact. I'll be at work the rest of the week, and you go on.

18 And then if we can go to the second email. This is
19 from Richie Cullen, and Richie Cullen again is who?

20 A. He's a salesman at that time.

21 Q. Richie Cullen writes to you, Larry Doud is on this as well.
22 I have to agree with Bill. The conference taught us one thing
23 that if the reason we are taking on additional business is
24 profit driven, then it is usually the wrong reason to proceed.
25 I am not against bringing on additional business, but if it

M1PBDOU5

Pietruszewski - Redirect

1 means we're going to have a live-in DEA agent all the time with
2 us, we must proceed with caution. I know we ultimately will do
3 the best to protect RDC.

4 And Larry Doud responds. Well, gee thanks, Richie. I
5 agree too.

6 MR. GOTTLIEB: Your Honor thank, you very much. The
7 only additional thing that I would ask to be able to do is to
8 put in -- read into the record the emails and the exhibits that
9 we discussed earlier this morning and which I believe there's
10 no objection to their admissibility, if I could just have one
11 moment.

12 The following defense exhibits, your Honor, we ask be
13 received in evidence. I believe there's no objection to the
14 following numbered defense exhibits: Defense Exhibit A13, A14,
15 A15, A16, A17, A19, A20, A21, A22, A49, A56, A58, A59, A60,
16 A61, A64.

17 And with that, your Honor, thank you very much.

18 (Defendant's Exhibits A13-A22, A49, A56, A58-A61, A64
19 received in evidence)

20 THE COURT: Any further questions for this witness?

21 MS. ROTHMAN: Yes, your Honor. Thank you.

22 REDIRECT EXAMINATION

23 BY MS. ROTHMAN:

24 Q. Good afternoon, Mr. Pietruszewski.

25 A. Good afternoon.

M1PBDOU5

Pietruszewski - Redirect

1 Q. I want to just get a few things straight. You were asked
2 some questions about Mr. Doud emailing the salesmen about a
3 change in policy for turning on new accounts in 2016, right?

4 A. Yes.

5 Q. And Mr. Gottlieb asked you if that was before the attorneys
6 had changed the policy, right?

7 A. Yes.

8 Q. But just to be clear, Mr. Pietruszewski, did the attorneys
9 change the written policy as to how RDC would conduct due
10 diligence?

11 A. No.

12 Q. And were you present in a meeting where after consulting
13 with the attorneys it was determined the policy would not be
14 changed?

15 A. Yes.

16 Q. Let's pull up just a few of those documents that
17 Mr. Gottlieb just put into evidence. Can we pull up defense
18 Exhibit A13, please.

19 What is this document?

20 A. It was the Rochester Drug Co-Operative customer
21 questionnaire.

22 Q. Did all pharmacy customers complete their questionnaires?

23 A. No, they did not.

24 Q. Were there customers that kept getting controlled
25 substances from RDC even though they hadn't filled out their

M1PBDOU5

Pietruszewski - Redirect

1 questionnaire?

2 A. Yes.

3 Q. Let's look at one example, Ms. Drescher, what's in evidence
4 as Government Exhibit 101E, please. Let's just zoom in on the
5 second email.

6 Can you read what you wrote to Julius Morton and
7 Jessica Pompeo on June 25, 2014?

8 A. Yes. I know we do not have the questionnaire on file. The
9 last information we received from this account was back the end
10 of 2012.

11 Q. Did Bay Ridge keep getting supplied with controlled
12 substances even though RDC didn't have updated information from
13 them?

14 A. Yes.

15 Q. Thank you. We can take that down.

16 Now, you were also asked some questions about a
17 conference that you went to with Jessica and other folks from
18 compliance. Do you remember that?

19 A. Yes.

20 Q. Can we pull up Defense Exhibit A18, please.

21 And I think this was the email that Mr. Gottlieb
22 showed you; is that right?

23 A. It is.

24 Q. At the top of the email Mr. Doud writes that he wants to
25 get compliant with the suggestions, right?

M1PBDOU5

Pietruszewski - Redirect

1 A. Yes.

2 Q. Now, do any of the suggestions in the bottom of your email
3 relate to reporting suspicious orders?

4 A. No, it does not.

5 Q. Do they relate to maintaining effective control against
6 diversion?

7 A. No, it does not.

8 Q. Do they relate to reporting to the DEA when you terminate
9 pharmacy customers?

10 A. No, it does not.

11 Q. Can we just go to the second page. There's actually one
12 reference in this to the victims of opioid abuse and a video
13 Chasing the Dragon. Do you see that?

14 A. Yes.

15 Q. Do you know if Mr. Doud watched that video?

16 A. I'm not sure.

17 Q. We can take that down.

18 Now, during cross examination this morning you looked
19 at some examples of pharmacy customers of RDC. Do you remember
20 that?

21 A. Yes.

22 Q. Now, Mr. Pietruszewski, across the board, were you shutting
23 off pharmacies with red flags of diversion at RDC?

24 A. No.

25 Q. Across the board, were you shutting off pharmacies that you

M1PBDOU5

Pietruszewski - Redirect

1 believed were diverting controlled substances?

2 MR. GOTTLIEB: Your Honor, objection. It's unclear.

3 THE COURT: Overruled. You can recross.

4 MR. GOTTLIEB: It's the form, across the board.

5 THE COURT: You can clear that up if you want to
6 recross. I'll allow it.

7 A. Can you repeat that.

8 Q. Across the board, were you shutting off pharmacies that you
9 believed were diverting controlled substances at RDC?

10 A. No.

11 Q. What happened with the majority of pharmacy customers that
12 you believed were diverting controlled substances?

13 A. We were still shipping to them.

14 Q. Across the board, were you releasing orders of interest
15 without investigating them first?

16 A. Yes.

17 Q. Across the board, were you reporting pharmacies to the DEA?

18 A. No, we were not.

19 Q. Now, in the few instances that you took some action, were
20 some of those occasions where the DEA had brought that pharmacy
21 to your attention first?

22 A. Yes, it was.

23 Q. Like Plainfield, for example?

24 A. Yes.

25 Q. And let's look at Defense Exhibit A62. This is an email

M1PBDOU5

Pietruszewski - Redirect

1 about Waschko's pharmacy. Do you remember that,

2 Mr. Pietruszewski?

3 A. Yes.

4 Q. And I think you were asked questions about turning off
5 their controls. Do you remember that?

6 A. Yes.

7 Q. Let's just look at what the bottom email says. I think
8 what it says is the DEA was at the store and when the driver
9 was leaving, he saw the DEA putting the computer and files in
10 clear bags.

11 So is it true, Mr. Pietruszewski, that after the DEA
12 raided Waschko's pharmacy, RDC decided to turn them off?

13 A. Yes.

14 Q. Thank you. We can take it down.

15 Mr. Pietruszewski, when it came down to sales versus
16 compliance, which did Mr. Doud choose?

17 A. The sales.

18 Q. Let's look at a few more examples. Do you remember being
19 asked some questions about the Chemist Shop on your cross
20 examination?

21 A. Yes.

22 Q. I think there was an email where Mr. Doud said that we
23 should stop shipping controls to the Chemist Shop?

24 A. Yes, there was.

25 Q. Let's look at what happened after that email. Please put

M1PBDOU5

Pietruszewski - Redirect

1 up for Mr. Pietruszewski what's been marked for identification
2 as Government Exhibit 1231. We can scroll to the bottom of the
3 email so Mr. Pietruszewski can see the email from Mr. Morton.

4 You see the email on the bottom, Mr. Pietruszewski?

5 A. It says all.

6 Q. Yes. Do you recognize it?

7 A. Yes.

8 MS. ROTHMAN: Your Honor, the government offers
9 Exhibit 1231.

10 THE COURT: Any objection?

11 MR. GOTTLIEB: Your Honor, may I took a look at it,
12 please.

13 THE COURT: Yes.

14 MR. GOTTLIEB: No objection.

15 THE COURT: It will be admitted into evidence.

16 (Government's Exhibit 1231 received in evidence)

17 MS. ROTHMAN: Can we publish to the jury?

18 THE COURT: Yes.

19 Q. If you can zoom in on the top email.

20 After RDC decides to terminate the Chemist Shop, can
21 you read what Mr. Doud wrote?

22 A. Counter to what we do.

23 Q. So Mr. Doud is saying that turning off pharmacy customers
24 is counter to what RDC did?

25 MR. GOTTLIEB: Your Honor, objection. It's obviously

M1PBDOU5

Pietruszewski - Redirect

1 responding to emails that are a part of this thread.

2 THE COURT: Overruled. You can recross.

3 A. I believe so.

4 Q. Mr. Pietruszewski, based on your many years at RDC, was
5 turning off pharmacy customers that displayed clear signs of
6 diversion counter to what RDC did?

7 A. No, we didn't turn the pharmacies off.

8 Q. It was counter to what RDC did?

9 A. Yes.

10 Q. I think my question was a little unclear. Thank you,
11 Mr. Pietruszewski. Let's go down to the bottom of this chain.

12 I want to ask about the beginning email from
13 Mr. Morton, can you remind us who Julie Morton was?

14 A. Julius at the time was the DEA auditor that worked for RDC.

15 Q. If we can zoom in on the second from the bottom paragraph
16 that begins, please note.

17 Can you just read that paragraph, please?

18 A. Sure. Please note we have two similars to deal with on the
19 horizon, that would be ProHealth and 370 Pharmacy Corp. Again,
20 sister stores I believe. They are in the same locale as the
21 Chemist Shop and would be a competitor of Gallo and Viti I
22 would imagine. Their exhibited dispensing is almost identical
23 to the Chemist Shop and they will fill for the same troubling
24 doctors. RDC must devise an appropriate strategy in response
25 for those accounts as well. I visited the stores in 2014 and

M1PBDOU5

Pietruszewski - Redirect

1 noted that they filled questionable RXs written for oxycodone.

2 Q. What do you understand Mr. Morton do be saying in this
3 email?

4 A. That the 370 pharmacy and the ProHealth are doing the same
5 as the Chemist Shop. They buy high amounts of oxy.

6 Q. Did RDC terminate 370 pharmacy while you were in
7 compliance?

8 A. I do not believe we did.

9 Q. Did RDC terminate ProHealth while you were in compliance?

10 A. No, we did not.

11 Q. Let's look at a few examples. Ms. Drescher 106D, please,
12 that's in evidence. Let's just zoom in on the top email from
13 Mr. Morton. To understand what this is about, let's scroll
14 down so we can see the pharmacy.

15 What's the pharmacy's name for the order of interest?

16 A. That is ProHealth pharmacy.

17 Q. So ProHealth pharmacy was still a customer in October of
18 2015 even though Julius Morton had concerns in 2014?

19 A. Yes.

20 Q. We can take that down and go to Government Exhibit 106E,
21 please. If we can zoom in. Ms. Pompeo's email to you and
22 Mr. Morton.

23 It is mind boggling to me that these pharmacies don't
24 care what they are doing and practicing due diligence
25 procedures seems to be an inconvenience to them.

M1PBDOU5

Pietruszewski - Redirect

1 So ProHealth was still a pharmacy customer in November
2 of 2015 even though Julius Morton had concerns in 2014?

3 A. Yes.

4 Q. We can take that down and please pull up Government Exhibit
5 106H, please. Zooming in on the top email, please, where
6 Mr. Morton writes: This dispensing report analysis exhibits
7 dispensing that is very concerning. Do you see that?

8 A. Yes, I do.

9 Q. So ProHealth was still an RDC customer in April of 2016
10 even though Mr. Morton had concerns in 2014?

11 A. Yes.

12 Q. We can take that down. Mr. Pietruszewski, do you recall
13 being asked some questions about Total Care Crosby and
14 Specialty Care pharmacies?

15 A. Yes.

16 Q. What do you remember about those pharmacies?

17 A. They were filling prescriptions for Dr. Terdiman and
18 Dr. Olivieri I believe for oxycodone.

19 Q. I think you were shown an email from April of 2013 about
20 attempting to restrict some of their oxycodone. Do you
21 remember that?

22 A. Yes.

23 Q. Let's look at what happened to Total Care Crosby after that
24 email. Ms. Drescher, can you please pull up what's in evidence
25 as Government Exhibit 258. If we can just filter for Total

M1PBDOU5

Pietruszewski - Redirect

1 Care Crosby. Let's scroll down for all the order of interest
2 for 2016 for Total Care Crosby. If we can go to the right side
3 of the column and focus on column P, orders of interest
4 shipped. Just scrolling down, do you see any zeros in that
5 column?

6 A. No, I do not.

7 Q. So all of the orders of interest that Total Care Crosby
8 generated in 2015 were shipped?

9 A. Yes, they would have been shipped.

10 Q. You can take that down.

11 Now, I want to end with some final questions,
12 Mr. Pietruszewski. When you worked at RDC, did you ship orders
13 of controlled substances to pharmacies that you believed were
14 diverting controlled substances?

15 A. Yes.

16 Q. Did you know that was wrong?

17 A. Yes.

18 Q. Why did you do it?

19 A. Cause that's what Larry Doud wanted us to do.

20 Q. I believe you were asked on cross examination and you said
21 you didn't want to send those drugs to bad pharmacies, but you
22 did do it?

23 A. Yes, I did.

24 Q. Did you know what you were doing?

25 A. Yes.

M1PBDOU5

Pietruszewski - Recross

1 Q. Did you do it by mistake?

2 A. No.

3 Q. Did you know it was wrong?

4 A. Yes.

5 Q. So why did you do it?

6 A. That's what was wanted of us to do.

7 MS. ROTHMAN: Your Honor, I have no further questions.

8 THE COURT: Any further questions?

9 MR. GOTTLIEB: Very briefly, your Honor.

10 THE COURT: Sure.

11 RECROSS EXAMINATION

12 BY MR. GOTTLIEB:

13 Q. Mr. Pietruszewski, you were just asked questions about
14 ProHealth pharmacy and you seemed to have remembered when
15 questioned by the government what happened and what RDC did or
16 didn't do with regard to its authority to purchase.

17 Isn't it true that ProHealth pharmacy had its
18 authority to purchase controlled substances suspended in 2015?

19 A. I don't think it was 2015.

20 Q. When was it?

21 A. I have to look and see.

22 Q. Now, you were shown just now on redirect Government's
23 Exhibit 1231. Can we put that up on the screen. If we can
24 show that to the jury, your Honor, I know it's in evidence?

25 THE COURT: Yes.

M1PBDOU5

Pietruszewski - Recross

1 Q. Mr. Pietruszewski, you were asked just to read that top
2 email from Larry Doud which said counter to what we do. Right?

3 A. Yes.

4 Q. This had to do with the Chemist Shop and concerns about
5 what they are doing, correct, with regard to controlled
6 substances, right?

7 A. Yes, sir.

8 Q. On the bottom of page 1 Richie Cullen is writing to
9 everybody. Richie Cullen writes: Okay. I just got off the
10 phone after a 45 minute conversation with Joe Gallo of Chemist
11 Shop. We went around and around as to what was told to them by
12 Julius and what wasn't. They even when as far as saying Juice
13 never said we would have to stop doing business with any of
14 these doctors and that all of their doctors are highly
15 respected physicians in the industry.

16 Bottom line, they've made a decision that they will
17 not stop doing business with these doctors based on Julius's
18 say so. That's when I said, based on that, we can no longer
19 sell them controlled substances and narcotics.

20 And then if we can just continue just to complete that
21 part of the thread.

22 Richie Cullen went on to say: I told them they need
23 to sign the bottom of this stock certificate and have a
24 medallion seal affixed by a bank, send it in for redemption and
25 we will see that it is taken care of. Richie.

M1PBDOU5

Pietruszewski - Recross

1 So now, let's go to the response to Richie Cullen's
2 email on page 1 from Larry Doud in response. Larry Doud
3 writes: Tough call, Richie. Thanks for taking care of it.
4 You see that?

5 A. Yes, I do, sir.

6 Q. And then Richie Cullen responds to that. Richie Cullen
7 responds and says: They were tough, but I think they knew it
8 was coming. Never like making those calls.

9 And then Larry Doud then in response to what had
10 already been said, that's that when he says, Counter to what we
11 do, correct?

12 A. Yes.

13 Q. And that's after being told --

14 A. -- about the Chemist Shop.

15 Q. And that it was going to be terminated, correct?

16 A. Yes.

17 Q. And that's after Larry Doud said to Richie Cullen, Tough
18 call, Richie. Thanks for taking care of it, correct?

19 A. Yes, he said that.

20 Q. You were just asked questions about compliance. It's fair
21 to say that all of those pharmacies that you recall and
22 testified about that were either suspended or terminated, all
23 of them sold controlled substances, correct?

24 A. All those pharmacies sold controls, yes.

25 Q. And for every single one that you recall being suspended or

M1PBDOU5

Pietruszewski - Recross

1 terminated, that meant there would be less money paid to RDC
2 for sales and purchases of controlled substances, correct?

3 A. Yes.

4 Q. And for each of those suspensions and terminations, Larry
5 Doud approved it, correct?

6 A. Yes.

7 Q. When you were asked on redirect just now using "across the
8 board," is it fair to say that there were many pharmacies
9 across the board who were investigated by RDC when there were
10 red flags, they were investigated, correct?

11 A. Yes.

12 Q. Across the board if there were red flags, RDC with its
13 outside auditors, with its own internal staff did the best they
14 could with the insufficient personnel to go out and to see what
15 the problem was and something could be done to fix it, correct?

16 MS. ROTHMAN: Objection.

17 THE COURT: Sustained. It's argumentative.

18 Q. Mr. Pietruszewski, you were just asked about the red flags
19 and diversion. You told this jury yesterday, did you not, that
20 while there were red flags of diversion, you yourself did not
21 know for a fact that there was diversion, correct?

22 A. Stores showed red flags. I didn't necessarily know that
23 they were diversion, but they showed red flags.

24 MR. GOTTLIEB: Your Honor, thank you very much.

25 THE COURT: Any further questions for this witness?

M1PBDOU5

Pietruszewski - Recross

1 MS. ROTHMAN: No, your Honor.

2 THE COURT: Thank you, sir. You can step down.

3 (Witness excused)

4 THE COURT: The government can call its next witness.

5 MR. BURNETT: Briefly on the side before you call the
6 next witness.

7 THE COURT: Let me give the jury a break. We'll
8 continue at 3:45.

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M1PBDOU5

Pietruszewski - Recross

1 (In open court; jury not present)

2 THE COURT: Yes.

3 MR. BURNETT: We just need about 10 minutes to make a
4 change to the expert's slides. He's the next witness.

5 THE COURT: All right. Are we in all in agreement
6 here? I had some other minor suggestions regarding some of
7 these titles that either side doesn't make an objection. I
8 think some of these titles do sort of reflect what you
9 anticipate this witness's testimony to be rather than what's
10 reflected in the document.

11 If it significantly throws you off or it's going to
12 take a significant amount of time, then maybe you can leave it.
13 I suggest that in my numbers, I'm using your numbers, I
14 suggested on number 3, and I'm going to make sure we're all
15 clear on where we're going with this. Number 3, RDC shipments
16 of opioids. I would recommend it just say, RDC shipment of
17 opioid between 2010 and 2015. Is that a problem?

18 MR. BURNETT: So just deleting by V-I 25 percent from
19 the title?

20 THE COURT: Yes, and then have the testimony. You can
21 leave that down in the chart.

22 MR. ROOS: Very minor. I'm sure Mr. Burnett's got
23 this, but it's actually 2010 to 2017.

24 THE COURT: Yes, that's true. And then the next one I
25 would suggest that you simply say oxycontin increase in RDC's

M1PBDOU5

Pietruszewski - Recross

1 opioid shipment. Is that a problem?

2 MR. BURNETT: It's not exactly accurate.

3 THE COURT: I'm a little concern about this title
4 doesn't really describe this chart.

5 MR. BURNETT: We can say RDC's increase in opioid
6 shipment, dash, breakdown.

7 THE COURT: I don't have any problems with that if
8 there's no objection to that portion of it. I'm not sure that
9 it makes it a whole lot clear.

10 MR. JANEY: No, it doesn't.

11 MR. BURNETT: I'm just trying to make it not
12 argumentative. Everything it says is accurate. I don't want
13 to waste too much time.

14 THE COURT: OxyContin increase in RDC opioid shipment.
15 You want to say breakdown.

16 MR. BURNETT: Because it also says fentanyl on there.

17 THE COURT: That's fine. And then the next one. RDC
18 sales of opioids between 2010 and 2015?

19 MR. BURNETT: I'll change it to 2017.

20 THE COURT: And you can leave the percentage increase
21 in the chart.

22 And the next one, fentanyl. I don't know if we
23 discussed this, fentanyl and opioid.

24 MR. BURNETT: This is another one to revise to say a
25 breakdown because it has more than one drug that's being

M1PBDOU5

Pietruszewski - Recross

1 described in it.

2 THE COURT: I would sort of take out sales were the
3 key driver of the increase. I think that's more argumentative.
4 Fentanyl sales -- well, fentanyl sales and opioid sales over
5 this period or something like that.

6 And the next one I think we did discuss that, RDC
7 opioid shipment compared to industry sales.

8 MR. BURNETT: Yes.

9 THE COURT: The next one, just take out more than
10 double in the title and have that testimony. The one after
11 that, what I have is RDC sales growth of opioid products
12 compared to other products.

13 MR. BURNETT: Okay.

14 THE COURT: And you say you were going to drop 12 and
15 13.

16 MR. BURNETT: As long as 10 and 11 are okay, then
17 we're going to drop 12 and 13.

18 THE COURT: I'm going to allow 10 and 11, so we'll
19 drop 12 and 13 and I'll allow 14 and 15. On 16, I suggest RDC
20 oxycontin and fentanyl orders shipped after they were flagged,
21 and 17 I think was fine. We didn't really discuss 18 and 19 and
22 20. Defense had no objections to that?

23 MR. JANEY: We'll deal with it on cross, your Honor.

24 THE COURT: That's what I'm going to anticipate so we
25 can move smoothly. How long do you think you're going to take

M1PBDOU5

Pietruszewski - Recross

1 to --

2 MR. BURNETT: Maybe 15 minutes. I want to make sure
3 the witness can authenticate it.

4 THE COURT: Sure. We'll continue in about 15 minutes.

5 (Recess)

6 THE COURT: Are we ready to go?

7 MR. BURNETT: We're all set, your Honor.

8 THE COURT: We'll get the jury. What does it look
9 like scheduling wise for tomorrow? You think you might rest by
10 tomorrow?

11 MR. ROOS: Professor Cutler is going to go on right
12 now. I think we wouldn't finish, but we'll finish in the
13 morning tomorrow on direct and he'll be on for the cross.

14 Our next witness after that is Paulsen who is about 30
15 minutes on direct. We're thinking about cutting some of our
16 witnesses and concluding with a Paulsen to sort of clean up.
17 We're going to email defense counsel tonight to let them know
18 what our definitive plan is. If we do that route, I think we
19 can rest tomorrow. If we don't do that route, it's possible we
20 could lead a little in the next day. We'll let them know this
21 evening.

22 THE COURT: We'll think about how we proceed. If you
23 rest tomorrow, I'd like to go ahead and start the defense case
24 on Thursday. I'm trying to figure out if we're going to sit
25 all day or half a day on Friday.

M1PBDOU5

Pietruszewski - Recross

1 MR. GOTTLIEB: Obviously what we're hearing now is a
2 significant change. What I mean by that, following Paulsen --
3 and they obviously have a right to do whatever the heck they
4 decide to do -- but we understood there would be at least two
5 additional witnesses, so we don't have a witness right now as
6 we speak for Thursday.

7 THE COURT: How many witnesses do you anticipate?

8 MR. GOTTLIEB: Three.

9 THE COURT: All right. Start talking and get them
10 available for Thursday.

11 MR. GOTTLIEB: We'll call when we get out.

12 THE COURT: What I don't want to do is, I don't want
13 to take Thursday off and make the jury come in here Friday. I
14 rather do Thursday as much as we can. If we don't finish, if I
15 have to give them the day off, I'll give them Friday off and
16 then we'll come back Monday, but I'd like to fill up the days
17 if we can.

18 MR. ROOS: Just in terms of filling up, I think we
19 have a scenario where we rest before five tomorrow. I'm not
20 sure if it's possible for defense to have anyone available.

21 THE COURT: I'm not going to force them into that
22 situation. If you rest before five tomorrow, I think the jury
23 will be happy and they'll be happy to come back the next day if
24 I can tell them we're not going to waste their time. And then
25 particularly if I can tell them that we either have a half day

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Pietruszewski - Recross

1 or no day on Friday and either finish up defense witness on
2 Monday or have summation on Monday.

3 MR. ROOS: And then the only other question would be
4 with regards to the weekend, would the defense be ready to go.

5 (Continued on next page)

Mlp3dou6

1 THE COURT: All right. Let's see how far we can get
2 with this witness. But it would be good if the government
3 could rest tomorrow and we could have some defense witnesses,
4 if not all of the defense witnesses, I mean, at this point, the
5 defense witnesses that are contemplated, other than possibly
6 the defendant, do you think they would take more than a day?

7 MR. JANEY: A single witness, your Honor?

8 THE COURT: No, I'm talking about all your witnesses.

9 MR. JANEY: Yes.

10 THE COURT: Okay. You think they'll take more than
11 two days?

12 MR. JANEY: Probably not more than two days, your
13 Honor.

14 THE COURT: All right. Okay. So let me assess it and
15 see where we are and then see what I want to say to the jury.

16 MR. ROOS: We do we have a deadline for them to tell
17 us who the witnesses are?

18 THE COURT: Same deadline.

19 MR. ROOS: We were telling them a few days before.

20 THE COURT: They should tell you a few days before.

21 MR. BURNETT: There is also a significant expert issue
22 for one of their witnesses. We have pretty much no idea what
23 he's going to say. It will need to get litigated.

24 MR. JANEY: I think we've heard from the government
25 six times in the last six seconds that they would like the

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1 defense witness list.

2 THE COURT: You don't want to cut them off by telling
3 them? I have a list. I assume it's among those people on that
4 list that I explained to the jury. Is that correct?

5 MR. BURNETT: They're free to call whoever they want.
6 If we want to litigate some of the issues, it would be good to
7 know.

8 THE COURT: I have Dr. Michael O'Neil, I have
9 Dr. Martin Martinovic, I have Carlos Aquino, I have Steven
10 Norman. I assume they are going to be some or all of those
11 witnesses.

12 MR. JANEY: The only issue, your Honor, and which
13 we've just already mentioned, is the issue of notice. Based on
14 the earlier schedule described by the government, and again, to
15 reiterate Mr. Gottlieb's comment, the government isn't tied to
16 calling a witness, is our witnesses are largely out of state.
17 And getting them here on Thursday is the challenge and
18 that's --

19 THE COURT: Start talking to them tonight about trying
20 to get here to them here on Thursday. If at all possible, I'd
21 like to have Thursday for witnesses. If it's not possible to
22 have a full day of witnesses on Thursday, then you can tell me
23 with your best effort who you can get here so we can get those
24 witnesses out of the way. Because I'd like to charge this jury
25 Tuesday or Wednesday at the latest next week.

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1 MR. JANEY: Understood, your Honor.

2 THE COURT: The jury is here. Let's see how far we
3 get with this.

4 (Jury present)

5 THE COURT: You can be seated, ladies and gentlemen.
6 Thank you.

7 Government call its next witness.

8 MS. ROTHMAN: Your Honor, with the Court's permission,
9 I would just read two stipulations and offer some exhibits into
10 evidence in advance of the next witness's testimony.

11 THE COURT: Yes.

12 MS. ROTHMAN: Thank you, your Honor.

13 The first is Government Exhibit 1001, a stipulation
14 between the parties, and I'll just read the relevant portion.
15 The parties have agreed: (1) that venue is proper in the
16 Southern District of New York with respect to the charges in
17 Counts One and Two of the indictment in this matter. And by
18 this stipulation the defendant hereby waives any argument or
19 defense that he might make with respect to venue not being
20 properly established in the Southern District of New York with
21 respect to those charges.

22 Your Honor, at this time we'd offer Government Exhibit
23 1001 into evidence.

24 THE COURT: Any objection?

25 MR. GOTTLIEB: No objection.

Mlp3dou6

1 THE COURT: It will be admitted in evidence.

2 (Government's Exhibit 1001 received in evidence)

3 MS. ROTHMAN: Thank you.

4 Government Exhibit 1004, another stipulation between
5 the parties. We'd offer that stipulation into evidence, your
6 Honor.

7 THE COURT: Any objection?

8 MR. GOTTLIEB: May I see it?

9 MS. ROTHMAN: I can read the relevant portion.

10 MR. GOTTLIEB: Okay.

11 MS. ROTHMAN: Sure.

12 The parties agree that Government Exhibits 301 through
13 342 are true and accurate copies of records maintained by the
14 New York Bureau of Narcotic Enforcement relating to
15 prescriptions for controlled substances filled at the
16 pharmacies listed on the following chart between January 2012
17 and March 2017.

18 Your Honor, at this time we'd offer into evidence
19 Government Exhibit 1004, the stipulation, as well as Government
20 Exhibits 301 through 342.

21 THE COURT: Any objection?

22 MR. GOTTLIEB: No, your Honor.

23 THE COURT: They will be admitted in evidence.

24 (Government's Exhibit 1004, 301 through 342 received
25 in evidence)

Mlp3dou6

Cutler - Direct

1 MS. ROTHMAN: Thank you, your Honor.

2 MR. BURNETT: The government calls Professor David
3 Cutler.

4 DAVID CUTLER,

5 called as a witness by the Government,

6 having been duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY MR. BURNETT:

9 Q. You are free to take your mask off, Professor Cutler.

10 Good afternoon, Professor Cutler. Where do you work?

11 A. I'm a professor at Harvard University.

12 Q. What are you a professor of?

13 A. I am an economist in the economics department.

14 Q. What areas of economics do you focus on?

15 A. My primary specialty is in health economics.

16 Q. What's that?

17 A. Health economics is the study of people's health, of
18 medical care, of all the ways that the economy and policy
19 influence our health.

20 Q. So we'll come back to that in some more detail in a couple
21 of minutes. But before we get there, I'd like to ask a bit
22 about your background.

23 Where did you go to college?

24 A. I was an undergraduate at Harvard University.

25 Q. What did you study there?

Mlp3dou6

Cutler - Direct

1 A. I was an economics major.

2 Q. After college, what did you do next in your career?

3 A. I was then a PhD student at M IT.

4 Q. What did that PhD program involve?

5 A. So, it's a lot of empirical work and understanding of the
6 economy, and my specialty was in public sector issues,
7 especially as they relate to health care. So a lot of work on
8 understanding health care markets, public policy, a lot of
9 empirical work.

10 Q. Let's take that one at a time. Could you describe some of
11 the particular areas within health economics you studied in
12 your PhD program.

13 A. Hmm-hmm. So, I've studied issues of population health, of
14 behaviors that people do that influence their health, smoking,
15 drinking, obesity, illegal drug use, unsafe sexual practices,
16 any number of other issues like that.

17 I've spent a lot of time studying insurance, how
18 people get insurance, how to help people get better insurance,
19 what we know about different ways of organizing insurance.

20 And I've spent a lot of time looking at medical care
21 market, markets for doctors and for hospitals and
22 pharmaceuticals, and the whole range of medical care services
23 that people need.

24 Q. You mentioned pharmaceuticals within that medical care
25 bucket. What specifically about the pharmaceutical industry

Mlp3dou6

Cutler - Direct

1 did you study?

2 A. So, I've done quite a lot of work over time on what are the
3 costs of pharmaceuticals, and what are the benefits of
4 pharmaceuticals. I've done a good deal of work looking at, as
5 people have taken more pharmaceuticals, how has that affected
6 our population's health. How does it affect how much we spend
7 on medical care, what are the good points and the bad points of
8 all of the pharmaceutical industry.

9 Q. You mentioned empirical work that you did in your PhD
10 program. First, just basic question, what do you mean by that?

11 A. Empirical work is work with data.

12 Q. What kinds of work with data did you do?

13 A. Yeah, a lot of work with data. So, for example, claims
14 records, so I've looked at data with information on millions
15 and millions of people in different insurance plans so I could
16 see what utilization patterns were like and how that was
17 related to outcomes to try and improve the care that people
18 get.

19 Q. When did you finish your PhD program?

20 A. 1991.

21 Q. What did you do after that?

22 A. I became an assistant professor at Harvard University.

23 Q. Have you been on the faculty at Harvard since then?

24 A. Yes, I have been.

25 Q. I'd like to start with your career at Harvard on the

Mlp3dou6

Cutler - Direct

1 faculty. What roles have you had?

2 A. I started off as an assistant professor, and I was promoted
3 to associate and then full professor.

4 So I currently have appointments. My primary
5 appointment is in the economics department. I also have an
6 appointment at the Kennedy School of Government and at the
7 School of Public Health, so reflecting my wide engagement with
8 health care issues. And then for five years I was an associate
9 dean of faculty of arts and sciences at Harvard.

10 Q. What are some of the requirements for becoming a tenured
11 faculty member?

12 A. Really three different areas. One is one needs to do
13 research. So you want to do research to learn about the world,
14 to educate ourselves about the world. Second is teaching. So,
15 you spend a lot of time obviously teaching, and I really enjoy
16 it and teaching students at all levels, from undergraduates to
17 master's to PhD students, to any students. And then third is
18 service to the broad community of scholarship. Being on
19 government panels, being in professional societies, being an
20 advisor to companies when they need it, being -- just trying to
21 help teach the world some of the things that we have, that we
22 have to share.

23 Q. Let's talk a little bit more about each of those categories
24 starting with teaching. What kinds of classes do you teach?

25 A. I teach -- so first, I love teaching. I teach a course for

Mlp3dou6

Cutler - Direct

1 undergraduates, a big lecture course on why is there no cure
2 for health. We look at various health problems around the
3 world, and we try to look at why is it we've been unable to
4 solve them. The course looks at three issues in particular. A
5 third of the course is spent on pharmaceuticals, why is it that
6 we are so unhappy with the pharmaceutical industry. We also
7 look at H.I.V. AIDS, and we look at U.S. health care reform.
8 Those are the three topics we look at.

9 Q. Within that topic on the pharmaceutical industry, what
10 types of issues do you discuss with your class?

11 A. So, we really frame it as many pharmaceuticals are
12 extraordinarily valuable to people. They are just extremely
13 valuable. They let them live longer, healthier lives, and yet
14 some people cannot afford them in the U.S., in poor countries
15 around the world, in middle income countries. And there is
16 tension between how do we get people what they need and make it
17 affordable, versus also providing incentives for companies to
18 develop new drugs and to get better and to get drugs out to
19 people. How do we try and bridge that divide.

20 Q. What, if anything, do you do to stay up to date on those
21 topics about the costs and benefits of the pharmaceutical
22 industry?

23 A. I read very widely. So anything in health economics, there
24 are journals. Of course, many of these discussions happen in
25 public newspapers and magazines and on TV, so I watch all of

Mlp3dou6

Cutler - Direct

1 those. I also talk regularly with companies, so any company
2 that's buying health insurance, as most companies do or a lot
3 of companies do for their employees. I talk with governments,
4 I am on various government panels that look at pharmaceuticals
5 in particular, and health care in general. I've been on
6 various advisory commissions to advise the government and other
7 public and private organizations on how to think about
8 pharmaceuticals and health care in general.

9 So just a lot of reading, discussing, debating the
10 issues.

11 Q. Now, in addition to your teaching, I think you said you
12 also have a research component of your job?

13 A. That's correct.

14 Q. Broadly speaking, what does your research look at?

15 A. My research is focused on how do we improve the
16 population's health, both through the things that we do and
17 that happen in society that influence our health. And how do
18 we structure our medical system that is as cheap as we can make
19 it while also delivering us the highest quality care that we
20 can get.

21 Q. Could you describe some examples of topics that you
22 research within that broader subheading.

23 A. Yeah, so I've done a lot of research on -- I told you about
24 some of the work I've done on pharmaceuticals and on the
25 benefits and costs of that. I've done quite a lot of research

Mlp3dou6

Cutler - Direct

1 on, for example, differences in health care spending across the
2 country. In some areas it is much higher, so, for example, in
3 some areas it is twice as high as in other areas per person.
4 What are we getting out of it. And conversely, when we're not
5 getting out of it, what policies could we take that would allow
6 us to spend less than the high spending areas without giving up
7 on the -- on the benefits of care.

8 Q. What, if any, research have you done with respect to actors
9 within the pharmaceutical distribution chain?

10 A. So, I've done quite a lot of work on pharmaceuticals. I
11 haven't written a specific paper on individual actors, but it's
12 been important in all of the work that I do, particularly about
13 things like the cost of medical care and the cost of
14 pharmaceuticals, and understanding all the distribution
15 channels are important in understanding those costs, and also
16 in things like making sure how do we get people the drugs that
17 they need, where in many cases we just have great difficulty
18 getting to people the drugs that they need both in the U.S. and
19 elsewhere because of cost or because of unavailability or other
20 kinds of restrictions on people's access to pharmaceuticals.

21 Q. What are some of the methods you use in your research?

22 A. Almost all of my research involves a mix of understanding
23 economic theory, that is, what are the incentives that drive
24 people and firms and how do they work, as well as doing data
25 work. So working with large samples of data, I have

Mlp3dou6

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1 observations sometimes on millions of people, sometimes on
2 billions of people. I have many, many observations, and I
3 bring them together to tell a story about what is happening to
4 people, what is happening to their health, to the money that's
5 being spent.

6 Q. Has any of your research focused on the distribution or use
7 of opioids specifically?

8 A. Yes. I have written quite substantially on the opioid
9 industry, on opioids and the industry behind opioids.

10 Q. Can you describe at a high level your research on those
11 topics?

12 A. Yeah. I talked about how many pharmaceuticals are
13 extremely valuable. Unfortunately, opioids are one of the
14 counter-examples to that. So I've done work, for example,
15 looking at what's happened over time, people are being
16 prescribed a lot more opioids than they used to be. And by all
17 measures, it hasn't -- we haven't seen commensurate benefits.
18 So obviously the biggest measure is enormous amounts of opioid
19 overdose deaths and the opioid epidemic that the country is
20 facing. But in addition, if you look at people who are in
21 pain, there is not a lot -- the pain is not subsiding any more
22 rapidly than it was before people were taking opioids. Their
23 ability to participate in the labor force is not increasing any
24 more than it was before opioids were commonly available.

25 So it's been an example of something where the medical

Mlp3dou6

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1 system has really been not just unhelpful, but actually harmful
2 to people, in that people have become both addicted to and
3 excessively using drugs which are very costly and not
4 beneficial.

5 Q. What, if any, data have you analyzed in connection with
6 your study of opioid distribution and use?

7 A. Yeah. So I've looked at opioid distribution across the
8 country. So I've had data from the DEA, the Drug Enforcement
9 Administration, they collect data on all opioids that are
10 distributed by zip code, so I've had data for upwards of 20
11 years on all opioid distribution to every county. I added up
12 to every county in the country so I know of all 3,000 counties
13 how many opioids they were getting. Then matched that with
14 data from government vital statistics on mortality rates in
15 different areas in the country, in those same areas, so I can
16 see what's been happening to opioid overdose as it's been
17 related to prescriptions of opioids.

18 I also have data on neonates in hospitals because of
19 their moms addicted to opioids, emergency department admissions
20 for opioid overdose, inpatient admission for opioid overdose.
21 So a lot of measures of harm associated with opioid overdose.
22 And I've also tried to look at some potential benefits, like
23 labor force participation and things that I've matched as well.

24 Q. From your research generally, have you published books and
25 articles?

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1 A. I've published three books in which I was an author or
2 co-author. I've edited many more books. And I've written I
3 think well over 100 articles, although I don't keep track of
4 the exact number.

5 Q. Now, so far you have been talking about your teaching, your
6 research work as a professor. Do you also do work with other
7 outside organizations?

8 A. Yes, I do.

9 Q. At a high level, what kind of organizations have you worked
10 for?

11 A. So some are professional societies. So there is a lovely
12 society called the American Society of Health Economists which
13 I am the president of. Various organizations, American
14 Economic Association and professional organizations. As I
15 mentioned briefly, I've been involved in various government
16 policy issues, so I've been an advisor to the federal
17 government.

18 I am currently on a commission on health costs in the
19 State of Massachusetts. I've advised other state governments.
20 I've also advised many corporations, asked me, hey, what's
21 going on in health care, are there things we should be thinking
22 about that we should be looking forward to or looking into. I
23 give talks to companies, talks to hospital societies, talks to
24 physician societies. Basically anyone who wants to hear my
25 views about health care, I'm happy to talk to them about it.

Mlp3dou6

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1 Q. Now, in addition to that public and private sector work
2 that you have you just described, have you ever worked on
3 litigation before?

4 A. I have worked on litigation, yes.

5 Q. At a high level, what kind of litigation?

6 A. So in the 1990s I was involved when the State of
7 Massachusetts was suing the tobacco companies for damages due
8 to tobacco. And then very recently -- so then I didn't do
9 anything for a while. And then very recently I've been
10 involved in the past few years in the litigation where counties
11 and state governments are suing opioid manufacturers,
12 distributors, and dispensers. So I'm involved in several of
13 those lawsuits.

14 And even more recently, I've been involved, there is a
15 class action lawsuit against the Juul, Juul Labs, the folks who
16 make the vaping devices, so I've in both of those, I've been --
17 and they are also being sued by the school districts and
18 counties, and in both of those I'm representing the people
19 suing, because of the damages that have occurred because of the
20 use of those products.

21 Q. Now, with respect to the opioid related litigation, without
22 getting into the substance of any of your opinions in those
23 cases, can you describe what types of data you've analyzed in
24 connection with that work.

25 A. Yes, so I'm really looking at issues of causality. To what

Mlp3dou6

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1 extent were the excessive opioids causal in the harms that have
2 resulted from that. So I described how I use data, how I
3 gather data on all opioid shipments from every company to every
4 area of the country, so I've been using data like that. I've
5 matched that up to data on death from opioid-related causes and
6 non-opioid related causes in different areas, matched that up
7 to demographic and economic information on those areas, so I
8 can see what else was going on in those areas so I can draw a
9 picture about what was happening as opioids were spreading to
10 the health of each area of the country, and how important were
11 opioids relative to other things in explaining those trends in
12 health.

13 MR. BURNETT: Your Honor, at this time the government
14 moves to qualify Dr. Cutler as an expert.

15 THE COURT: Any objection?

16 MR. JANEY: No objection, your Honor.

17 THE COURT: You can inquire on that basis.

18 Q. I'd like to ask you a few preliminary questions about your
19 involvement in this case, before we get to the substance.

20 To your knowledge, have you met any of the witnesses
21 who are testifying in this case?

22 A. I do not believe I have.

23 Q. Have you met the defendant, Mr. Laurence Doud?

24 A. I do not believe I have.

25 Q. Do you have any personal knowledge of the facts about this

Mlp3dou6

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1 case?

2 A. No, I don't.

3 Q. Is there anyone who assists you in the work that you've
4 done in this case?

5 A. Yes. There is a firm that helped out with the analysis
6 that I worked with on the analysis. So, as you can imagine,
7 this involves massive amounts of data analysis, so I and
8 another -- and a firm called Compass Lexecon worked on that.
9 That's sometimes why I'll say "we," because I'm referring to me
10 and the team that I worked with.

11 Q. Are you compensated for the work that Compass Lexecon does
12 or has done on this case?

13 A. I'm not compensated for any work that Compass Lexecon does.

14 Q. Are you being compensated for your own work on this case?

15 A. Yes, I am.

16 Q. Does that include your testimony today?

17 A. Yes, it does.

18 Q. How are you being compensated?

19 A. So I charge \$900 an hour. And that's independent of
20 anything else. There is no -- that's not contingent on
21 anything other than just the amount of time.

22 Q. About how much have you billed to date?

23 A. I -- if I recall -- so I meant to look this up.

24 Q. Just an estimate is fine.

25 A. I think it's on the order of roughly 50 hours, which would

Mlp3dou6

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1 be about \$40,000.

2 Q. What are those payments for?

3 A. Oh. Those are payments for the time that I put in for the
4 work that I do in terms of doing the analysis, and drawing the
5 conclusions from that.

6 Q. Does the amount you get paid depend in any way on the
7 opinions you give in this courtroom?

8 A. No, it doesn't.

9 Q. Does the amount you get paid depend in any way on the
10 outcome of the trial?

11 A. No, it doesn't.

12 MR. BURNETT: So Ms. Hauck, if you can please put up
13 on the screen what's been marked for identification as
14 Government Exhibit 903. If you can flip through this for the
15 Court and for Professor Cutler.

16 Q. Do you recognize Government Exhibit 903?

17 A. Yes, I do.

18 Q. What is it?

19 A. These are tables and charts that I prepared in response to
20 the questions that I was asked.

21 Q. Do these tables and charts summarize voluminous quantities
22 of data that you have reviewed?

23 A. Yes. In the background there is a lot of different data
24 that we can talk about as we go through. And obviously, you
25 can't present all of that data, so I tried to summarize it and

Mlp3dou6

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1 tell the story that the data are telling.

2 MR. BURNETT: At this time the government offers
3 Government Exhibit 903.

4 THE COURT: Any objection?

5 MR. JANEY: No objection, your Honor.

6 THE COURT: I will admit it into evidence. I'm not
7 quite sure what I have, whether the entire thing is 903 or
8 whether it is just this.

9 MR. BURNETT: The full packet is 903.

10 (Government's Exhibit 903 received in evidence)

11 MR. JANEY: Can I clarify for the record that Exhibit
12 903 comprises only 18 pages?

13 MR. BURNETT: I believe that's correct. Is this all
14 the way at the end, Ms. Hauck?

15 Yes.

16 MR. JANEY: Thank you, your Honor.

17 MR. BURNETT: Ms. Hauck, can you please turn back to
18 page one and publish for the jury with the Court's permission.
19 Q. Professor Cutler, I want to start with just a bit of
20 background. From your teaching research, are you familiar with
21 how the pharmaceutical distribution industry works?

22 A. Yes, I am.

23 Q. What does this slide show?

24 A. So, this is at a very high level how the pharmaceutical
25 distribution industry works. It's basically showing how you go

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1 from what's on the left, which are manufacturers, and the drugs
2 and the pills and patches and injections that they produce, to
3 the right, which is the use in terms of the patients. So how
4 is it that drugs go from manufacturers all the way to patients.

5 Q. I want to focus on the second step here in the chart, the
6 one that's labeled "wholesalers."

7 In your teaching and research, have you studied how
8 wholesalers perform their role in the pharmaceutical industry?

9 A. Yes, I have.

10 Q. What role do wholesalers play?

11 A. So wholesalers, as you can see, are the intermediaries
12 between the manufacturers on the one hand, and the pharmacies
13 on other. So what they do is they buy the medications from the
14 manufacturers, they bring them together, they warehouse them,
15 they put them in the appropriate units, and then they
16 distribute them to the pharmacies. So they're also called
17 distributors. So that's their primary function here.

18 Q. From your work, are you familiar with how wholesalers go
19 about making money?

20 A. Yes, I am.

21 Q. Let's turn now to slide two of Government Exhibit 903.
22 Using this slide, can you explain again in general terms how
23 wholesalers make money.

24 A. So, any firm you want to think about the profit, obviously,
25 any firm is thinking about profit. And so there are three

Mlp3dou6

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1 parts to that. The first part is the revenue, that is how much
2 money do you make selling goods. In this case, they are
3 selling to pharmacies, so how much money is made by selling to
4 pharmacies. Out of that come two costs. The one in the middle
5 are the costs of the drugs, so you remember they are buying the
6 drugs from the manufacturers and they are distributing them to
7 the pharmacies. So there is the cost of the goods sold, the
8 cost of the pills, and that's the first part. And then the
9 second part is the other costs of running the distribution
10 business. There is the general administration, and the
11 warehousing and the employees and the IT system and all of
12 that. Those are the non-drug costs.

13 Q. Focusing on costs for wholesalers, are there any unique
14 factors that go into the cost equation for pharmaceutical
15 wholesalers?

16 A. Yeah. So, the biggest share of the cost, of the two costs,
17 the biggest share of the costs are the drug costs. Those are
18 the costs of buying the pills, they then sell them at a list
19 price, but then typically, the wholesalers get a discount from
20 the manufacturers if they buy more, if they pay promptly, for
21 large-scale purchases. So there is a sort of discount, and
22 that discount off of the cost is a lot of what it turns into
23 the profit. They are selling at a list price, and then they're
24 winding up with discounts paying below that.

25 Q. Do those discounts always happen before the wholesalers

Mlp3dou6

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1 resells the drug on to a pharmacy?

2 A. Sometimes after. So it's as a result of the whole
3 transaction, but it is something that the wholesaler would know
4 about. So they know we bought this amount, and so therefore we
5 would get this discount.

6 Q. From your teaching and research, are you familiar with the
7 phrase full service distributor or wholesaler?

8 A. Yes, I am.

9 Q. What does that mean?

10 A. A full service distributor or full service wholesaler is
11 one that will carry the full range of products, ranging from
12 controlled substances like opioids to non-controlled
13 substances. Think about statins or antihypertensives or
14 insulin and even some non-pharmaceutical products like
15 Band-Aids and aspirin and so on. Generic drugs, branded drugs.
16 Basically the whole waterfront of what a pharmacy would want to
17 get for the kind of pharmaceutical end or the medical end of
18 what it's selling.

19 Q. As an economist, what's the economic rationale, if any, for
20 being a whole, a full service distributor as opposed to
21 specializing?

22 A. Yes. So, if I'm a pharmacy, I really don't want to have to
23 deal with many different wholesalers. I'd like to just deal
24 with one, so I'd like to get all my medicines from that one.
25 It's both easier in that I only have to deal with one, and also

Mlp3dou6

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1 sometimes the prices are lower because you are buying just from
2 one and the more you buy, the bigger the discount you can get.
3 Also, some wholesalers have minimum constraints, like they only
4 want to sell in certain amounts because getting drugs there is
5 costly.

6 So it's both lower cost and easier for a pharmacy, and
7 therefore, the wholesalers, many wholesalers want to be full
8 service so they can supply the entire amount of the
9 pharmaceutical needs of the pharmacy.

10 Q. I want to move from talking about wholesalers generally to
11 one wholesaler in particular, and that's Rochester Drug
12 Co-Operative. Are you familiar with that pharmacy or
13 wholesaler?

14 A. Yes, I am.

15 Q. How are you familiar with it?

16 A. Through this case.

17 Q. Did you have any knowledge, have you studied it prior to
18 your work on this case?

19 A. No, I have not.

20 Q. What kind of company is RDC?

21 A. So RDC is a full service distributor, full service
22 wholesaler. It supplied the full range of pharmaceutical and
23 some non-pharmaceutical products that the pharmacy is getting
24 and then selling.

25 Q. In your work on this case, have you reviewed data about

Mlp3dou6

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1 RDC's sales of different types of products?

2 A. Yes, I have.

3 Q. Now, I want to focus on some specific products that RDC
4 sold to begin with. From your teaching research, are you
5 familiar with what controlled substances are?

6 A. Yes, I am.

7 Q. What are they?

8 A. Controlled substances are substances that may have a
9 potential health benefit, but also have the potential for abuse
10 and harm.

11 So opioids are the classic case, where they can be
12 beneficial in terms of reducing pain, but they can also lead to
13 addiction, dependence, overdose, and death.

14 Q. Are there different categories of controlled substances?

15 A. Yes, there's ranging from category I, which is drugs for
16 which there is no legitimate medical use, think about heroin or
17 cocaine which are not allowed to be legally sold. Most opioids
18 that are sold are in category II. So they're Schedule II. So
19 those are drugs with the high potential for abuse, but they're
20 not banned from sale, but they have to be controlled. So under
21 the Controlled Substances Act, there are many requirements put
22 in place about the distribution of those drugs that apply to
23 those drugs, and not to other common drugs, not to any other
24 drugs.

25 Q. Based on your review of the sales data, did RDC sell

Mlp3dou6

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1 controlled substances, including opioids?

2 A. Yes, it did.

3 Q. Can you give some examples of types of opioids that RDC
4 sold.

5 A. Yup. So the two most common types were oxycodone, which
6 was the prime ingredient in OxyContin. That was the drug
7 launched in the mid-1990s that really led to an enormous use of
8 opioids over time. And another example was fentanyl, which
9 you'll sometimes see as a patch or another form of dosing, and
10 that would be -- that's a synthetic opioid that's also used for
11 very severe relief of pain.

12 Those are two common ones. There are many other ones
13 as well.

14 Q. Are all opioids the same strength as one another?

15 A. No, they're not.

16 Q. Could you explain how they differ?

17 A. So they differ in term of the potency. That is how much
18 pain relief, and, therefore, potential for harm comes from
19 them.

20 Q. From your research, is there a way that health economists
21 compare opioids based on their strength?

22 A. Yes. So there is a very, very common methodology used by
23 all researchers, by the government, and that's to put things in
24 units of equivalence to morphine. So morphine is a standard,
25 so you think about 1 milligram of morphine, and then the

Mlp3dou6

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1 different drugs are placed relative to how much their dosage
2 relative to 1 milligram of morphine.

3 Q. Is there a common abbreviation for those morphine milligram
4 equivalence?

5 A. It is often abbreviated MME, for milligrams of morphine
6 equivalent or morphine milligrams equivalent. That's the most
7 common metric people use.

8 Q. I want to walk through how that works. Starting very
9 simply. What is one MME?

10 A. One MME is 1 milligram of morphine.

11 Q. How many MMEs is 1 milligram of a different drug, say,
12 oxycodone?

13 A. Oxycodone is 1.5 MMEs, so it's like one and a half
14 milligrams of morphine.

15 Q. Why is it higher than just one MME?

16 A. Oh. It's greater potency.

17 Q. How about fentanyl, how many MMEs is 1 milligram of
18 fentanyl?

19 A. Yeah, so fentanyl is often delivered not by pill, but in
20 patches or in lozenges or things, so it varies depending on the
21 exact formulation. But, it's typically in the range of 50 to
22 100 MMEs. So it's like 50 to 100 milligrams of morphine per
23 dose.

24 Q. In connection with this case, have you used MMEs to analyze
25 data on RDC's sales of opioids?

Mlp3dou6

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1 A. Yes, I have.

2 Q. Just to be clear, why did you use MMEs as a metric in that
3 analysis?

4 A. Yeah, you need to put things in common units. It's like
5 saying someone went to the grocery store and they bought a
6 certain number of grapes and a certain number of watermelons.
7 You can't add how many grapes and how many watermelons they
8 bought. You have to put them in some units, for example,
9 dollars or what are is the caloric input or what is the amount
10 of calories available. So you'd add up the calories in the
11 grapes and calories in the watermelon.

12 It is doing the same thing here. It is saying what is
13 the total morphine equivalent in what is being dispensed.

14 Q. Let's turn now to slide three of Government Exhibit 903.
15 Could you explain for the jury what the data is that's charted
16 on this slide.

17 A. Yeah. So, what this chart is showing you, and I can
18 explain it more, is the quarterly shipments of milligrams of
19 morphine equivalent that RDC shipped to its pharmacies.

20 Q. Let's break the chart down. What's the time period that
21 this chart covers?

22 A. So the chart is from 2010 through 2017. And it's divided
23 into quarters, three-month periods, January, February, March
24 and so on. So each of the years you see on the bottom axis and
25 each of those numbers is the quarter. So the first quarter of

Mlp3dou6

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1 2010, up through 2011, and so on up through the first quarter
2 of 2017.

3 Q. So just for our reference point, about how many million
4 MMEs was RDC shipping per quarter in 2010?

5 A. Yeah. So it is shipping around 250 million MMEs. So you
6 can see the height of that is about 250 million on average.

7 Q. Could you describe what this chart shows about how RDC's
8 shipments of opioids changed between 2010 and 2017?

9 A. You can see there is a very sustained and large increase in
10 opioid shipments. So between 2010 and 2015, which was roughly
11 at the peak of the opioid shipments by RDC, it had increased by
12 125 percent. So it more than doubled over the time period.

13 Q. And during that peak year, 2015, about how many million
14 MMEs of opioids was RDC shipping per quarter?

15 A. It was roughly about 550 million MMEs per quarter.

16 Q. Now, have you looked into any data that went into creating
17 this increase in MME shipments?

18 A. Yes, I have. And in particular, I divided it into the two
19 major drugs that we were talking about, oxycodone and fentanyl.

20 MR. BURNETT: So Ms. Hauck, if you can please now turn
21 to slide four of Government Exhibit 903.

22 MR. JANEY: Objection. Just to clarify the record.
23 The witness was referred to by a different name than his own.

24 THE COURT: Okay.

25 MR. BURNETT: I was referring to Ms. Hauck the

Mlp3dou6

Cutler - Direct

1 paralegal, I wasn't referring to the witness.

2 Q. Now, Professor Cutler, if you could please explain again
3 what the black line is on this chart.

4 A. So the black line here is the same as the black line on the
5 previous chart. It is showing you the milligrams of morphine
6 equivalent that RDC shipped each quarter from 2010 through the
7 first quarter of 2017, and it is exactly the same. So it is
8 the same increase, the exact same numbers.

9 Q. So the black line is the same line that we saw in the prior
10 slide, slide three.

11 What's the orange line?

12 A. The orange line here is the shipments of oxycodone, so it
13 is the specific oxycodone shipments.

14 Q. Could you describe what this orange line shows about how
15 RDC's shipments of oxycodone changed between 2010 and 2017.

16 A. Hmm-hmm. The trend for oxycodone looks very similar to the
17 overall trend. In fact, it is a very high number. It shows a
18 very steady increase, in this case 115 percent increase, or a
19 bit more than a doubling of oxycodone shipments over this time
20 period.

21 Q. Now, the bottom line there, the blue one, what does that
22 blue line reflect?

23 A. The blue line is MME shipments of fentanyl.

24 Q. What does that line show about the change in RDC's
25 shipments of fentanyl between 2010 and 2017?

Mlp3dou6

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1 A. You can see of course the MMEs are lower. It's further
2 down. But the increase is in fact bigger. So it tripled, so
3 it was 222 percent, a tripling of the MMEs of fentanyl that
4 were shipped between 2010 and 2015.

5 Q. Just for reference between these two lines, the blue and
6 the orange one. About how many millions of MMEs did RDC ship
7 per quarter in 2015, focusing on the oxycodone?

8 A. Oxycodone, it's roughly 300 million MMEs per quarter.

9 Q. How many about with respect to fentanyl?

10 A. Fentanyl it's about 100 million MMEs per quarter.

11 Q. You've been testifying about RDC's sales of opioids
12 measured by MMEs. Were there other ways that you analyzed
13 RDC's opioid sales?

14 A. Yes. I also looked at the dollar value of sales.

15 Q. Why did you do that?

16 A. It's again another way to think about that, is how much
17 revenue is RDC earning from opioids, which of course are also
18 going to contribute for profits to are for RDC.

19 MR. BURNETT: Ms. Hauck, can you please turn now to
20 slide five of Government Exhibit 903.

21 Q. What's charted on this slide, Professor Cutler?

22 A. Yes. So it the same time period, so along the flat, the
23 bottom axis it is the same time period and the same quarters.
24 In this case what I'm showing you is the quarterly sales, that
25 is the dollar value of quarterly sales of opioids from RDC.

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1 Q. So, starting in 2010 as a reference point, about how many
2 dollars per quarter was RDC making from opioid sales in 2010?

3 A. A little bit under \$10 million per quarter.

4 Q. How did RDC's revenues from opioids change from 2010 to
5 2017?

6 A. They rose quite rapidly. So you can see that by 2015, it
7 was about \$60 million per quarter. That was an increase of
8 about 600 percent, so roughly a seven-fold increase in sales.

9 Q. Let's turn ahead to slide six. Could you explain what
10 slide six of Government Exhibit 903 shows.

11 A. Yup. So the black line here is the exact same as the
12 previous slide. So that's showing the total revenues from
13 sales of opioids. The orange and the blue are the same as two
14 slides ago, so the orange is the revenues from sales of
15 oxycodone, and the blue is the revenue from the sales of
16 fentanyl.

17 Q. So, let's take those one at a time. Let's start first with
18 the orange line, oxycodone like we did last time. What does
19 this chart show about how the sales of oxycodone changed
20 between 2010 and 2017, measured now on a dollar basis?

21 A. On a dollar basis they went up. They just about doubled,
22 so 93 percent increase is just about doubling through 2015.

23 Q. That was for oxycodone. I think you said the blue line was
24 fentanyl sales; is that correct?

25 A. That's correct. The blue line is fentanyl sales.

Mlp3dou6

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1 Q. How did RDC's revenue from fentanyl sales change between
2 2010 and 2015?

3 A. It increased absolutely enormously. So it increased by
4 2800 percent, about 29 times more revenue per quarter in 2015
5 relative to 2010.

6 Q. Now, earlier you testified that the growth of RDC's MME
7 shipments was driven more by oxycodone than fentanyl; is that
8 right?

9 A. That's correct, yes.

10 Q. Could you explain why the revenue growth was higher for
11 fentanyl sales?

12 A. Fentanyl was a more expensive drug than oxycodone. So
13 therefore, each increment to fentanyl sales, each increment of
14 fentanyl shipments adds more to sales than each increment of
15 oxycodone shipments. So that's why the revenue for fentanyl
16 rose more rapidly than the revenue for oxycodone in comparison
17 to the MMEs.

18 Q. Now, so far you've been testifying about RDC's opioid
19 sales. During your work on this case, have you also analyzed
20 data on opioid sales by other wholesalers during the same time
21 period?

22 A. Yes, I have.

23 Q. What, if anything, did you do with that data?

24 A. So remember I told you that because of reporting, we know
25 how many opioids are shipped to each county in the U.S. So, I

Mlp3dou6

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1 took for all the -- for three states in which RDC is biggest,
2 New York, New Jersey, and Pennsylvania, all the shipments of
3 opioids, both overall oxycodone and fentanyl, for all the other
4 distributors not RDC. So I could compare RDC's shipments
5 relative to the everyone else in the industry not RDC.

6 Q. Why did you decide to do that comparison?

7 A. One thing you always want to know, is this just a time
8 period where opioid shipments are increasing so everybody is
9 expanding their shipments of opioids or was this particular to
10 RDC.

11 Q. What did you find?

12 A. It's quite particular to RDC. So, while RDC's shipments of
13 opioids are increasing quite a lot, shipments from all the
14 other distributors combined were falling.

15 Q. So let's turn now to slide seven of Government Exhibit 903.
16 And Professor Cutler, could you describe at a high level what's
17 on this chart here.

18 A. So, at a very high level, what this chart is showing you is
19 for all opioids or for particular types of opioids, what was
20 happening to MME shipments from RDC, that's going to be in
21 blue, and then opioid shipments from everyone else, and that's
22 going to be in the orange.

23 Q. So, let's start with the pair of columns on the left,
24 labeled all opioids. Can you describe what that pair of
25 columns shows.

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1 A. So the blue is the increase, the percent change in RDC's
2 shipments of all opioids. That's 125 percent. That came
3 straight from the graph earlier. That shows RDC increased
4 125 percent.

5 The orange is showing all the other distributors in
6 those three states. All the other opioids shipped in those
7 three states, and they declined by 11 percent.

8 Q. How about the next pair of bars, above the label fentanyl.
9 What does that show?

10 A. So that's the same two for fentanyl, remember we saw
11 earlier where fentanyl shipments from RDC increased 222
12 percent. For all the other distributors together in those
13 three states, they declined 18 percent.

14 Q. Finally, the last pair of bars is labeled oxycodone. Can
15 you describe what the data there shows?

16 A. So the increase for RDC is 115 percent, that was the same
17 as earlier. And for oxycodone, all the other distributors in
18 total decline 10 percent.

19 Q. So to wrap up, what does the data that you analyzed on this
20 chart show you about the trend in RDC's opioid sales compared
21 to shipments by the rest of the industry?

22 A. What RDC was doing was very different from the rest of the
23 industry. The rest of the industry was declining in opioid
24 shipments over this time period. And RDC was increasing quite
25 rapidly.

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1 Q. Now, you have been testifying so far about focusing on
2 RDC's opioid sales. Were opioids the only products that RDC
3 sold?

4 A. No, RDC was a full service distributor, so it was providing
5 and selling drug as cross the board.

6 Q. Have you reviewed data on RDC's sales of other types of
7 products?

8 A. Yes, I have.

9 Q. Let's turn now to slide eight here. And can you start by
10 explaining what the chart on the left is.

11 A. So that is showing you for different years, so each year
12 from 2010 over on the left to 2016, the height of each bar is
13 showing you the total revenue to RDC. So you can see in 2010,
14 that's a number on the order of roughly 700 million. So that's
15 700 million in total sales, rising up to a bit above 2 billion,
16 about two and a quarter billion in 2015. So that's total.

17 And then it's dividing it into two parts. So the blue
18 are opioid products, so that's revenue from opioid products.
19 And the gray is revenue from non-opioid products.

20 Q. So, focusing on the blue section, you said that's RDC's
21 revenue from opioid products?

22 A. That's correct.

23 Q. How did RDC's revenue on a dollar basis change from 2010
24 through 2016?

25 A. It increased quite a lot. So you can see from 2010 through

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1 the height it was in 2015, it rose from 34 million to 242
2 million. It fell a little bit in 2016. It was then \$168
3 million.

4 Q. Now, did RDC's revenues from other product also grow during
5 that time period?

6 A. They did indeed.

7 Q. How is that shown on this chart on the left?

8 A. You can see the size of the gray areas also increasing, so
9 it's 685 million in 2010, up to just under \$2 billion in 2015.

10 Q. Now, have you been able to examine how RDC's opioid sales
11 changed as a percentage of overall revenue between 2010 and
12 2016?

13 A. That's in fact what's plotted in the chart on the right.

14 Q. Can you explain what the chart on the right shows.

15 A. Yeah. So for each of those years, what the chart on the
16 right is showing you is what shares of the revenue comes from
17 opioids. If you just take those two numbers in 2010 and you
18 divide the 34 million by the 685 million, 4.7 percent of RDC's
19 revenues were opioids. That increased to about 11 and a half
20 percent in 2014, roughly 11 percent in 2015.

21 Q. So just to break that down a little bit. In 2010 and 2011,
22 about what percentage of RDC's overall revenues came from
23 opioid sales?

24 A. About four and a half percent.

25 Q. And then looking ahead to 2014 and 2015, in those years,

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1 what percentage of RDC's overall revenues came from opioid
2 sales?

3 A. About 11 percent, a little over a 11 percent, so more than
4 twice as high.

5 Q. Now, have you been able to compare the growth in RDC's
6 opioid revenues compared to the growth in the revenues from
7 other products that RDC sold?

8 A. Yes, I have.

9 Q. Can we turn ahead now to slide nine on Government Exhibit
10 903. What does this slide show?

11 A. Again I am showing you for every quarter here, what I've
12 done is I've kind of normalized sales in the first quarter of
13 2010 to be one. So I've said relative to that being one, what
14 is the growth of sales of in blue opioid products, and in gray
15 non-opioid products. So how much did they grow relative to
16 each other.

17 Q. So let's start with the gray line. You said that charts
18 the growth of all non-opioid products?

19 A. That's correct.

20 Q. What does that show you about how revenues from non-opioid
21 products changed between 2010 and 2017?

22 A. They grew roughly by three, so a little bit over three. So
23 relative to where they were in 2010, in 2015, and 2016, they
24 were just about over three, so three times higher.

25 Q. And the blue line, that reflects revenue from opioid

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1 products; is that right?

2 A. That's correct.

3 Q. So, how, according to this chart, did RDC's revenues from
4 opioid products change during that same time period?

5 A. Here it rose much more. So here it rose to seven or eight
6 times higher, so it was a really much bigger growth in the
7 opioid sales than in the non-opioid sales.

8 MR. BURNETT: Your Honor, I think this is a natural
9 breaking point for the testimony if you think that's an
10 appropriate time to stop.

11 THE COURT: We'll adjourn for the day. Ladies and
12 gentlemen, we are going to adjourn for the day. I'll tell you
13 I think we are a little ahead of schedule. I'm hopeful that we
14 will finish the testimony no later than Monday or Tuesday
15 instead of midweek next week. So I want to keep us ahead of
16 schedule.

17 I ask you to be in the courtroom at 9:45 tomorrow.
18 Hopefully we can start on time and not have as many
19 interruptions as we had today and get in a full day of
20 tomorrow.

21 So don't discuss the case, keep an open mind. I'll
22 see you tomorrow at 9:45.

23 (Jury excused)

24 THE COURT: You can step down.

25 So, is there anything that we need focus on now or

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1 tonight? We'll continue this witness tomorrow. And the
2 government thinks that they may have one or two at the most
3 witnesses after this.

4 MR. ROOS: I think maximum will be four. And the
5 minimum will be two. Two being Paulsen and then probably a
6 paralegal as clean up. The four would be if we called the two
7 other witnesses we're thinking about cutting, and we'll
8 definitely let the defense know tonight.

9 THE COURT: How much longer do you think you will be
10 on direct examination?

11 MR. BURNETT: Probably between an hour and hour and a
12 half.

13 THE COURT: Okay. Let's see what we can do. If we
14 can get through the government's witnesses tomorrow. Start
15 talking to your witnesses for the defense. I'd really like to
16 have witnesses for Thursday. And we'll talk tomorrow about
17 what the schedule would look like in terms of finishing up the
18 witnesses and summations and charge.

19 So, my best guess is that some time between maybe
20 Tuesday and Wednesday we'll have summations and charge. I'll
21 see you all tomorrow morning at 9:45.

22 MR. GOTTLIEB: Good night.

23 (Adjourned until January 26, 2022, at 9:45 a.m.)
24
25

INDEX OF EXAMINATION

Examination of:	Page
Cross By Mr. Gottlieb . . . . .	.1061
Redirect By Ms. Rothman . . . . .	.1195
Recross By Mr. Gottlieb . . . . .	.1206
DAVID CUTLER	
Direct By Mr. Burnett . . . . .	.1221

GOVERNMENT EXHIBITS

Exhibit No.	Received
1231 . . . . .	.1201
1001 . . . . .	.1220
1004, 301 through 342 . . . . .	.1220
903 . . . . .	.1235

DEFENDANT EXHIBITS

Exhibit No.	Received
A43 . . . . .	.1095
A39 . . . . .	.1097
A68 . . . . .	.1100
A62 . . . . .	.1102
A23A . . . . .	.1104
A53 . . . . .	.1105
A54 . . . . .	.1109
A631112
A781112
A801114

1	A181190
2	A281193
3	A13-A22, A49, A56, A58-A61, A641195
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